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Congress's Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today's Congress and Courts

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Congress's Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today's Congress and Courts

Paul Taylor*

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I. INTRODUCTION

The Congressional Research Service ("CRS") is part of the legislative branch of the federal government. It is a department of the Library of Congress that works exclusively as a nonpartisan analytical, research, and reference arm for the United States House of Representatives and Senate, and its mission is to support an informed national legislature.¹

In July 2004, in the midst of House debate over a bill that would restrict federal court jurisdiction, CRS issued a memorandum stating its staff was unaware of any precedent for a law that would deny the inferior federal courts original jurisdiction or the Supreme Court appellate jurisdiction to review the constitutionality of a law of Congress.² However, the next month, in response to a letter from the House Judiciary Committee, CRS admitted its previous memorandum was in error, stating, "This memorandum responds to your request that we reassess an earlier memorandum of ours . . . [§ 25 of the Judiciary Act of 1789] did operate to preclude any Federal court from deciding the validity of a Federal statute from 1789 to 1875. Accordingly, our earlier memorandum was incorrect."³

That the official research arm of Congress missed such an important precedent in the history of Congress's power over the federal courts—the Judiciary Act of 1789, enacted during the First Congress—demonstrates how, in current times, it is all too easy to forget the vital origins of the federal judiciary and how those origins inform a historically accurate understanding of Congress's authority to limit federal court jurisdiction. This is especially true in light of the recognition that, today, "[n]umerous esteemed legal scholars have emphasized that it would be a constitutional violation of separation of powers principles for Congress to completely strip federal courts of jurisdiction over constitutional claims."⁴

1. See generally About CRS, <http://www.loc.gov/crsinfo/whatscrs.html>.

2. See 150 CONG. REC. H6600 (daily ed. July 22, 2004) (statement of Rep. Nadler, opposing the bill under consideration) ("Mr. Speaker, I place into the RECORD a memo from the Congressional Research Service that says that Congress has never passed any legislation that denies to the Federal courts the jurisdiction to adjudicate the constitutionality of an act of Congress."). The debate on the House floor concerned H.R. 3313, a bill to amend title 28, United States Code, to limit federal court jurisdiction over questions under the Marriage Protection Act of 2004. See *id.* at H6580.

3. H.R. REP. NO. 108-691, at 14–15, n.39 (2004) (citing Johnny H. Killian, Senior Specialist, American Constitutional Law, American Law Division, Memorandum to House Committee on the Judiciary re: Congressional Control of Jurisdiction of Federal Courts (Aug. 16, 2004)).

4. *Id.* at 96 (dissenting views) (emphasis added); see also *id.* (citing Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) and Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985)).

The members of the Constitutional Convention that drafted the Constitution, including those who were elected to serve in the First Congress, had a much more robust view of Congress's powers over the federal courts than prevails today. The modern Supreme and lower federal courts' involvement in virtually every detail of national policy has resulted in the common presumption that such a situation is constitutionally required. Yet the Constitution provides that the lower federal courts are entirely creatures of Congress, as is the appellate jurisdiction of the Supreme Court, excluding only cases within the Supreme Court's original jurisdiction—those “affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.”⁵ By the terms of the Constitution, then, it is up to Congress to decide whether and how to grant any of the federal courts jurisdiction to decide cases, including those involving constitutional issues. The sole exception is that the Constitution requires the Supreme Court to hear cases within its very limited original jurisdiction.

That was also the understanding of the First Congress, as demonstrated by its enactment of the Judiciary Act of 1789,⁶ which provided that the Supreme Court, regarding constitutional challenges to federal law, could review only those final decisions of the state courts that held “against [the] validity” of a federal statute or treaty.⁷ Under the Judiciary Act of 1789, if the highest state court held a federal law constitutional, no appeal was allowed to any federal court, including the Supreme Court.⁸

Not only did the Act limit federal court jurisdiction, but it did so in a way that was specifically designed by Congress to effect a specific result—the increased chance that federal laws would be upheld. If the highest state court upheld a federal provision, there could be no appeal to federal court, and the decision upholding the federal provision would stand.⁹ For the first 125 years of our nation's existence, the only state court judgments reviewable in the Supreme Court or by any federal court absent diversity jurisdiction were those in which the highest state courts had denied federal claims or defenses.¹⁰ Under the Judiciary Act of 1789, a denial of a federal

5. U.S. CONST. art III, § 2, cl. 2.

6. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85 (codified as amended at 28 U.S.C. § 1257).

7. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 352 (1816); see also ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 31 n.81 (7th ed. 1993) (“The 1914 legislation [substantively amending the relevant portion of section 25 for the first time] gave the Supreme Court power to review by certiorari state court decisions in favor of rights claimed under federal law; previously, only state court decisions denying a federal right had been reviewable.”) (citation omitted).

8. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. at 85–87.

9. *Id.*

10. See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 189 (1928) (“For one hundred and twenty-five years this jurisdiction [created by the Judiciary Act of 1789] remained, in effect, as it was molded by the First Congress. Even the powerful centralizing impulses of the Civil War left it unchanged.”).

claim or defense by the highest state court would result in another opportunity for federal courts to reverse such state court decisions and uphold the federal claims or defenses.¹¹ On the other hand, if the highest state court upheld a federal claim or defense, that was the end of the matter, and no federal court would have the opportunity to hold otherwise and deny such federal claims or defenses.¹² The Judiciary Act of 1789 significantly restricted the range of issues that could be decided by the newly-created federal courts and the Supreme Court in other ways as well,¹³ leaving a huge variety of cases involving constitutional, tort, and contract issues beyond the reach of any federal court.

The principal drafter of the Judiciary Act of 1789 was Senator Oliver Ellsworth of Connecticut, a greatly influential founder who had served as one of five members of the Committee of Detail that issued the first draft of the Constitution and who would later serve as the third Chief Justice of the Supreme Court.¹⁴ As Ellsworth wrote when he served on the Court, the federal courts under the Judiciary Act of 1789 had "cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a *small proportion* of the cases which an unlimited jurisdiction would embrace."¹⁵

Senator Ellsworth was also the principal drafter of two other statutes enacted in the First Congress: legislation that required certain process and procedures to be used by the federal courts, including the Supreme Court; and legislation defining federal crimes to include a provision that would immediately remove a federal judge from office through means independent of impeachment, namely conviction of bribery in federal court.¹⁶

Like the Judiciary Act of 1789, the Process Act of 1789 and the Crimes Act of 1790, having been passed by the First Congress, are perhaps the

11. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. at 85–87.

12. *Id.*

13. See FRANKFURTER & LANDIS, *supra* note 10 at 4, 12 ("We pay Oliver Ellsworth and his associates ample homage by calling their handiwork [the Judiciary Act of 1789] a great law," while noting that "[t]he content of jurisdiction conferred on the new judiciary was very limited in comparison with what it now exercises.").

14. See William R. Casto, *Oliver Ellsworth*, in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* 297 (Scott Douglas Gerber ed., 1998) [hereinafter Casto, *Oliver Ellsworth*].

15. *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 11 (1799) (emphasis added).

16. See WILLIAM GARROTT BROWN, *THE LIFE OF OLIVER ELLSWORTH* 197 (1905) ("Three other laws were passed by the first Congress to supplement the judiciary act [of 1789], and two of these also were apparently from Ellsworth's hand; for he headed the committees which severally reported an act additional to the judiciary act and an act to define crimes and offenses cognizable under the authority of the United States [the Act of April 30, 1790]. He also helped to frame the third supplementary law, which regulated process in the courts [the Act of September 29, 1789].") (citing Senate Journals, 2d Sess., 12, 16, 17, 63 and Senate Journals, 1st Sess., 153).

statutes most informative of an original understanding of Congress's constitutional power over the federal judiciary. As has been observed by the authors of the leading treatise on federal court jurisdiction, "the first Judiciary Act is widely viewed as an indicator of the original understanding of Article III and, in particular, of Congress' constitutional obligations concerning the vesting of federal jurisdiction."¹⁷ And as the Supreme Court itself has recognized, the Judiciary Act of 1789 was "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."¹⁸

More recently, the Supreme Court has declared itself the "ultimate interpreter of the Constitution,"¹⁹ which implies that it—and not Congress—is also the ultimate arbiter of the powers of Congress over the Supreme Court's jurisdiction. If that is true, then the Court alone is the master of its own domain. The Supreme Court has also stated, albeit in dicta, that Article III courts are "presided over by judges appointed for life, subject *only* to removal by impeachment."²⁰ However, both statements, in many ways, are placed in doubt by the enactments of the First Congress and the actions of the former members of the Constitutional Convention who served in the First Congress.

This Article explores what the First Congress, speaking through three foundational pieces of enacted legislation, had to say about the full extent of Congress's power over the federal judiciary, and what today's Congress and federal courts can learn from that understanding. It also explores how the legislation passed by the First Congress reflects the traditional understanding of the deference federal courts should give to the acts of the national legislature—a deference that should give way only when such acts are clearly unconstitutional.²¹ Finally, this Article explores how the modern Supreme Court's deviation from that traditional understanding threatens its popular legitimacy today.²²

In doing so, this Article attempts to present a picture of the bookends that sit at either end of the Supreme Court's decisions throughout American history. On one end sits the three statutes enacted by the First Congress,

17. RICHARD H. FALLON, DANIEL J. MELTZER, AND DAVID L. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 28 (4th ed. 1996).

18. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888).

19. *Baker v. Carr*, 369 U.S. 186, 211 (1962); *see also* *Powell v. McCormack*, 395 U.S. 486, 549 (1969) ("[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution."); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution.").

20. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955) (emphasis added).

21. *See infra* Part XIII.

22. *See infra* Part XIV.

which served to anchor the federal judiciary to a limited jurisdiction in order to provide robust protections for the acts of the legislature. On the other end sits a modern Supreme Court whose tenuous 5–4 decisions striking down democratically enacted legislation increasingly untether the Court from the core concepts that framed the creation of the federal courts. With such imbalanced bookends, it remains to be seen whether the volumes between them can cohere much longer.

II. JAMES MADISON AND THE CONVENTION DEBATES

The new Constitution provided the backdrop for the actions of the new Congress, and any inquiry into Congress's power must start with the constitutional text and the debate that preceded it.

At the Constitutional Convention, James Madison, as a delegate from Virginia, sought to confer upon Supreme Court judges an independent and concurrent power to veto legislative enactments.²³ However, Madison's proposal made clear that if the Supreme Court were ever to veto legislation, Congress could override that veto by a super-majority vote²⁴ in order to maintain the legislature as the final arbiter of a law's constitutionality. Even Mr. Mercer, who supported Madison's motion, did so on the grounds that he preferred a judicial veto subject to a legislative override to an unchecked power of the judiciary to declare laws void with no means of reversing such decisions.²⁵ In the end, Madison's motion was overwhelmingly defeated by a vote of 3–8²⁶ after "Mr. Pinkney opposed the interference of the Judges in the Legislative business . . ."²⁷ Consequently, even Madison's proposal to allow the Supreme Court to strike down legislation subject to the protection of a Congressional override was rejected because it was perceived as granting too much power to the Court.

The rejection of Madison's proposal that the Supreme Court should have a definitive role in striking down legislation came even after the jurisdiction of the Court was determined to be significantly confined. The Committee of Detail had provided that "[t]he jurisdiction of the supreme tribunal shall extend . . . to all cases, arising under laws passed by the

23. 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 294–95 (1911) (Journal) [hereinafter FARRAND].

24. *Id.* at 298 (Madison's Notes).

25. *See id.* ("Mr. Mercer heartily approved the motion . . . [but] disapproved of the Doctrine that the Judges as expositors of the Constitution should have [final] authority to declare a law void.").

26. *Id.* at 295 (Journal); *see also id.* at 298 (Madison's Notes).

27. *Id.* at 298 (Madison's Notes).

general (Legislature).”²⁸ Mr. Johnson moved to insert the words “this Constitution and the” so the phrase would read “the jurisdiction of the supreme tribunal shall extend . . . to all cases, arising under this Constitution and the laws passed by the general (Legislature).”²⁹ But Madison thought this authority would be far too broad. Madison’s own records of the debates state:

[I] doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought *not* to be given to that [Judicial] Department.³⁰

Madison’s doubts were apparently assuaged by assurances that it was “generally supposed that the jurisdiction given was *constructively limited to cases of a Judiciary Nature*.”³¹ Only subsequent to that assurance was the vote on the motion unanimous.³² What Madison meant by “cases of a Judiciary Nature” is unclear, but it implies a limited set of issues over which courts traditionally had authority, most likely the narrow issues of punishment for contempt and the regulation of lawyers and juries.³³ In any

28. *Id.* at 146.

29. *Id.* at 430 (Madison’s Notes), 423 (Journal).

30. *Id.* at 430 (Madison’s Notes) (emphasis added).

31. *Id.* (emphasis added).

32. *See id.* at 431 (Madison’s Notes).

33. Early discussions of inherent authority in the federal courts reiterate familiar modern understandings of the areas over which courts have inherent power. Such early discussions regard the limited powers of courts to enforce sanctions for contempt and to regulate lawyers and juries. *See, e.g.,* *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); *United States v. Duane*, 25 F. Cas. 920, 922 (C.C.D. Pa. 1801) (No. 14,997) (claiming that, in holding defendant in contempt, “[w]e confine ourselves within the ancient limits of the law, recently retraced by legislative provisions and judicial decisions”); *Hollingsworth v. Duane*, 12 F. Cas. 359, 363–64 (C.C.D. Pa. 1801) (No. 6616) (argument of counsel). State courts also asserted inherent authority to punish contempt. *See, e.g.,* *State v. Johnson*, 3 S.C.L. (1 Brev.) 155, 158 (S.C. 1802) (*per curiam*) (“Justices of peace have a power derived from the common law, and necessarily attached to their offices, of committing and confining for gross misbehaviour in their presence . . .”). Regarding the regulation of lawyers, *see, for example, King of Spain v. Oliver*, 14 F. Cas. 577, 578 (C.C.D. Pa. 1810) (No. 7814) (characterizing the right to inquire by what authority an attorney acted on his client’s behalf as one “inherent in all courts,” but acknowledging that this inherent power “may be taken away, or qualified by express statute; or additional cautions may be superadded”). Early state courts also asserted authority over court personnel. *See, e.g.,* *Yates v. New York*, 6 Johns. 337, 372–73 (N.Y. 1810) (argument of counsel) (asserting that courts, including chancery courts, possess inherent authority to direct and control court officers, including clerks, in the discharge of their functions), *overruled by Mitchell’s Case*, 12 Abb. Pr. 249 (N.Y. Sup. Ct. 1861). Early federal courts also asserted authority to regulate jurors. *See, e.g.,* *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824) (explaining that “the law has invested Courts of justice with the authority to discharge a jury from giving any verdict” when justice requires it); *United States v. Coolidge*, 25 F. Cas. 622,

case, the phrase “cases of a Judiciary Nature” certainly encompassed something much less broad than all constitutional and federal legal issues.

III. THE CONSTITUTIONAL TEXT

Having assured itself of the very limited nature of the Supreme Court's inherent authority under the Constitution,³⁴ the Convention approved a final text.

Under that approved text, the Supreme Court's original jurisdiction covers those cases it can hear in the first instance. The Constitution provides that only two types of cases are within the original jurisdiction of the Supreme Court³⁵: Article III, Section 2, Clause 2 provides that “[i]n all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.”³⁶

623 (C.C.D. Mass. 1815) (No. 14,858) (asserting the power to withdraw a juror if, while a party is on trial before a jury, something occurs that “will occasion a total failure of justice if the trial proceed”); *Offutt v. Parrott*, 18 F. Cas. 606, 607 (C.C.D.C. 1803) (No. 10,453) (fining jurors who escaped from the jury room). State courts asserted similar authority. *See, e.g., Commonwealth v. Bowden*, 9 Mass. (9 Tyng) 494, 495 (1813) (recognizing inherent authority of a court to withdraw a juror); *Alexander v. Jameson*, 5 Binn. 238, 242–43 (Pa. 1812) (asserting inherent authority of a court to regulate what jurors take into the jury room). Also, Joseph Story, in his *Commentaries on the Constitution*, wrote that:

[T]here are certain incidental powers, which are supposed to attach to them, in common with all other courts, when duly organized, without any positive enactment of the legislature. Such are the power of the courts over their own officers, and the power to protect them and their members from being disturbed in the exercise of their functions.

3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1768 (Boston, Hilliard, Gray, & Co. 1833).

34. *See supra* notes 23–33 and accompanying text.

35. However, the Constitution does not grant the Supreme Court *exclusive* original jurisdiction. *See, e.g., California v. Arizona*, 440 U.S. 59, 65 (1979); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930). Consequently, lower federal courts can also hear such cases if Congress desires.

36. U.S. CONST. art III, § 2, cl. 2. Article III, Section 2, Clause 2's reference to cases in which “a State shall be Party” does not include suits by citizens against states. *See United States v. Texas*, 143 U.S. 621, 643–44 (1892) (“The words in the Constitution, ‘in all cases . . . in which a state shall be party, the Supreme Court shall have original jurisdiction,’ . . . do not refer to suits brought against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States, even where such suits arise under the Constitution, laws, and treaties of the United States, because the judicial power of the United States does not extend to suits of individuals against states.”) (first emphasis added). The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

Regarding the federal courts below the Supreme Court, Article III, Section 1, Clause 1 of the Constitution provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts *as the Congress may from time to time ordain and establish*.”³⁷ Consequently, the Constitution grants Congress the rights to create lower federal courts, to not create them, or to abolish them once created.

Regarding exceptions that might be made to federal court appellate jurisdiction, the Constitution provides, in Article III, Section 2, Clause 2, that “[i]n all the other Cases [other than those in which the Supreme Court has original jurisdiction] . . . the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*.”³⁸ Consequently, the Constitution provides that Congress has plenary control over what cases might be appealed to the Supreme Court.

IV. THE FEDERALIST PAPERS (ALEXANDER HAMILTON)

Following the final drafting of the Constitution, Alexander Hamilton, along with James Madison and John Jay, wrote a series of newspaper articles to convince the people of New York State to support the Constitution’s ratification. These articles became collectively known as the *Federalist Papers*, and they contain some of Hamilton’s views regarding the meaning of the Constitution’s text. These views are consistent with the understanding that the federal judiciary was comparatively powerless under the Constitution.

As Hamilton wrote in *Federalist No. 81*, the Supreme Court’s original jurisdiction under the Constitution was very limited, as “the original jurisdiction of the Supreme Court would be confined to two classes of cases [cases affecting ambassadors, ministers, and consuls, and cases in which a State is a party], *and those of a nature rarely to occur*.”³⁹

In *Federalist No. 80*, Hamilton also defended the proposed Constitution against claims that it would allow Congress to create an overly powerful system of federal courts.⁴⁰ In doing so, he emphasized the broad nature of Congress’s authority to amend federal court jurisdiction to remedy any perceived abuses by the federal judiciary that might arise after their creation. Hamilton wrote:

37. U.S. CONST. art. III, § 1, cl. 2 (emphasis added).

38. U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

39. THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

40. THE FEDERALIST NO. 80 (Alexander Hamilton).

From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan *it ought to be recollected that the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.*⁴¹

It is important to note that Hamilton understood himself in *Federalist No. 80* to be discussing “the judicial authority of the Union,” that is, the judicial power generally and not just the Supreme Court’s appellate jurisdiction.⁴² As a result, Hamilton’s statement means that Congress can exclude entire categories of cases from federal court review.

These statements regarding the constitutional text followed Hamilton’s clear statements that the Constitution would create only an extremely weak judicial branch. He famously wrote in *Federalist No. 78* that the federal judiciary would have “neither FORCE nor WILL but merely judgment”⁴³ and that he viewed the federal judiciary as “the least dangerous” branch of government.⁴⁴ He also used yet stronger words, stating that the federal judiciary is “*beyond comparison the weakest of the three*”⁴⁵ branches and that of the three, “the JUDICIARY is *next to nothing*.”⁴⁶

41. THE FEDERALIST NO. 80, at 480 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

42. *Id.* at 480. Hamilton reiterated this point in *Federalist No. 81*, this time focusing on the Supreme Court: “To avoid all inconveniencies, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction [that] shall be subject to such *exceptions* and regulations as the national legislature may prescribe. *This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.*” THE FEDERALIST NO. 81, at 489 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (second emphasis added); *see also id.* at 485 (“[A]ppeals may be safely circumscribed within a narrow compass [by Congress].”) (emphasis added).

43. THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

44. *Id.*

45. *Id.* (emphasis added).

46. *Id.* (emphasis added) (quoting 1 MONTESQUIEU, THE SPIRIT OF LAWS 186 (1802)).

V. THE “JUDICIAL POWER” IN THE BROADER CONTEXT OF THE CONVENTION

In fact, it was because the Founders understood the federal judiciary as by far the weakest branch that they did not spend much time debating the powers of the federal judiciary at the Constitutional Convention. Not only is there no discussion of the phrase “judicial Power” in either the Convention records or any of the four plans submitted to the Convention for consideration,⁴⁷ but that phrase was not added to the judiciary article until very late in the work of the Committee of Detail.⁴⁸

Regarding Article III’s “vesting” clause, Article III, Section 1, Clause 1 of the Constitution vests judicial power in the manner prescribed in the Convention.⁴⁹ It does not require Congress to vest complete jurisdiction in the federal courts. The Constitution “vests” in the Supreme Court only its limited, original jurisdiction “[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party”⁵⁰ The word “shall” in this provision is not addressed to Congress, just as the word “shall” in the constitutional clauses vesting the legislative and executive authorities is not addressed to Congress.⁵¹ Similarly, where the Constitution provides that “[t]he judicial power shall extend” to certain cases, it can only mean that such power shall extend to such cases insofar as either the Constitution vests original jurisdiction in the Supreme Court or as the Constitution vests power in Congress to create

47. Edmund Randolph of Virginia, Charles Pinckney of South Carolina, William Patterson of New Jersey, and Alexander Hamilton of New York each submitted a plan of government to the Convention. 1 FARRAND, *supra* note 23, at 20–22, 242–45, 291–93; 2 *id.* at 134–37; 3 *id.* at 595–601. The delegates devoted the first half of the Convention to considering the resolutions submitted by Randolph. See 1 *id.*; 2 *id.* at 1–129. On July 24, 1787, the Convention unanimously agreed not to take specific action on the Patterson and Pinckney Plans, but to refer them, along with Randolph’s resolutions, to the Committee of Detail. See 2 *id.* at 98, 106. Hamilton’s proposal was never brought up for extended consideration. See *id.*

48. See 2 *id.* at 172, 186. The phrase “judicial Power” was first added to the beginning of Article III in a late draft of the Committee of Detail in James Wilson’s handwriting. See 2 *id.* at 163, 172. In that draft, what is now Section 2 begins, “The Jurisdiction of the Supreme (National) Court shall extend to all Cases” 2 *id.* at 172. Several weeks after the Committee of Detail issued its report, James Madison and Gouverneur Morris moved to substitute the phrase “The judicial Power” for the phrase “The Jurisdiction of the Supreme Court.” See 2 *id.* at 431. The Convention unanimously accepted this change without recorded debate. See 2 *id.*

49. See U.S. CONST. art. III, § 1, cl. 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

50. U.S. CONST. art. III, § 1, cl. 2.

51. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States”); U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

lower federal courts and Congress has in fact exercised that power by statute.⁵²

VI. OLIVER ELLSWORTH AND THE FIRST CONGRESS

The members of the First Congress who were most intimately involved with the drafting of the laws that implemented Article III of the Constitution and its provisions regarding the federal judiciary acted with the previously discussed constitutional backdrop in mind.

Because so many Framers were elected to the First Congress, it is widely accepted, including by the modern Supreme Court, that the enactments of the First Congress provide “‘contemporaneous and weighty evidence’ of the Constitution’s meaning”⁵³ Of particular importance regarding the creation of the federal judiciary was Oliver Ellsworth, who had served as a Connecticut delegate to the Constitutional Convention, as one of Connecticut’s first two Senators, and as the third Chief Justice of the United States.⁵⁴

Not only was Ellsworth the principal drafter of the Judiciary Act of 1789 while he served in the Senate, but he had also earlier served as one of only five members⁵⁵ of the Constitutional Convention’s Committee of

52. See FALLON ET AL., *supra* note 17, at 348 (“Although Article III states that ‘the judicial Power of the United States *shall* be vested’ (emphasis added), Congress possesses significant powers to apportion jurisdiction among state and federal courts and, in doing so, to define and limit the jurisdiction of particular courts.”); see also *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 619–20 (1874) (“[W]e find that this judicial power is by the Constitution vested in one Supreme Court and in such inferior courts as Congress may establish. *Of these courts the Constitution defines the jurisdiction of none but the Supreme Court.* Of that court it is said, after giving it a very limited original jurisdiction, that ‘in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress may prescribe.’ This latter clause has been the subject of construction in this court many times, and the uniform and established doctrine is, that Congress having by the act of 1789 defined and regulated this jurisdiction in certain classes of cases, this affirmative expression of the will of that body is to be taken as excepting all other cases to which the judicial power of the United States extends, than those enumerated. . . . We are under no necessity, then, of supposing that Congress, in the section we are considering, intended to confer on the Supreme Court the whole power which, by the Constitution, it was competent for Congress to confer in the class of cases embraced in that section.”) (emphasis added) (footnote omitted).

53. *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983)); see also *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 919 (1988) (observing that the decisions of the First Congress “are viewed as a repository of insight into the historical intent underlying article III”).

54. See Casto, *Oliver Ellsworth*, *supra* note 14, at 297, 302.

55. See *id.* at 297.

Detail,⁵⁶ which issued the first draft of the Constitution and was responsible for adding the phrase “judicial Power” to it.⁵⁷ His role in subsequent events strongly indicates Ellsworth may even have been the principal drafter of Article III of the Constitution itself.⁵⁸

Serving in the Senate in the First Congress, Ellsworth was both the primary author of the Judiciary Act of 1789,⁵⁹ as well as a key drafter of the Process Act of 1789⁶⁰ and the Crimes Act of 1790.⁶¹ So great was the respect that Ellsworth was shown by his Senate colleagues in the First Congress “that Aaron Burr joked, ‘if [Senator] Ellsworth had happened to spell the name of the Deity with two d’s, it would have taken the Senate three weeks to expunge the superfluous letter.’”⁶²

Because of his combined influence on the creation and development of the federal judicial branch, historian Frank Gaylord Cook dubbed Ellsworth the “father of the national judiciary,”⁶³ and historian William Garrott Brown wrote “if any one man can be called the founder, not of [the Supreme Court] only, but of the whole system of federal courts . . . Ellsworth is the man.”⁶⁴

56. See 2 FARRAND, *supra* note 23, at 97, 106.

57. See *id.* at 172.

58. See BROWN, *supra* note 16, at 197 (“Apart from [Ellsworth’s] authorship of the law [the Judiciary Act of 1789], his appointment to the first place on the [Senate Judiciary] committee strengthens the conjecture that it was he who, on the committee of five in the Constitutional Convention, had drafted the article on the judiciary.”).

59. See WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 27–53* (1995) [hereinafter CASTO, *EARLY REPUBLIC*]; DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS 47* (1997). Philip Doddridge of Virginia in the House of Representatives, years later, incorrectly stated that James Madison was the author of the Judiciary Act of 1789. See GALE AND SEATON’S REGISTER OF DEBATES IN CONGRESS 2899 (May 9, 1832). However, Madison subsequently wrote to Doddridge on June 6, 1832 and corrected him, stating that the drafting of the Act “was understood, truly I believe, to have proceeded from Mr. Ellsworth . . .” Letter from James Madison to Phillip Doddridge (June 6, 1832), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 221–22 (J.B. Lippincott & Co. 1865).

60. See CASTO, *EARLY REPUBLIC*, *supra* note 59, at 27–53; CURRIE, *supra* note 59, at 47.

61. See Senate Calendar Entry of Jan. 26, 1790, reprinted in 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789–MARCH 3, 1791: LEGISLATIVE HISTORIES, at 1741 (Charlene B. Bickford & Helen E. Veit eds., 1986) (“Ellsworth presented a bill defining the crimes and offences that shall be cognizable under the authority of the United States, and their punishment, which was read.”).

62. WILLIAM R. CASTO, *OLIVER ELLSWORTH AND THE CREATION OF THE FEDERAL REPUBLIC 1* (1997) [hereinafter CASTO, *CREATION*].

63. See Frank Gaylord Cook, *Oliver Ellsworth 1745–1807*, in 1 GREAT AMERICAN LAWYERS 335 (William Draper Lewis ed., 1907).

64. *Id.*

A. *The Judiciary Act of 1789*

During the First Congress, Ellsworth was the chairman of the Senate committee that was established to craft a bill to create and organize the federal judiciary.⁶⁵ James Madison would later recall that “[i]t may be taken for certain . . . that the bill organizing the Judicial Department originated in [Ellsworth’s] draft, and that it was not materially changed in its passage into a law.”⁶⁶

One of the most significant provisions of the Judiciary Act of 1789 was section 25, which Ellsworth authored.⁶⁷

Section 25 of the Act provided as follows:

[A] final judgment or decree in any suit, in the highest court . . . of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity[;] or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party . . . [such decision] may be re-examined and reversed or affirmed in the Supreme Court of the United States⁶⁸

In essence, under the Judiciary Act of 1789, if the highest state court held a federal law constitutional, no appeal was allowed to any federal court, including the Supreme Court.⁶⁹ Thus, the Act denied the inferior federal

65. See BROWN, *supra* note 16, at 184.

66. Letter from James Madison to Joseph Wood (Feb. 27, 1836), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 428 (J.B. Lippincott & Co. 1865).

67. See CHARLENE BANGS BICKFORD & KENNETH R. BOWLING, BIRTH OF THE NATION: THE FIRST FEDERAL CONGRESS 1789–1791, at 46 (1989) (“Sections ten through twenty-five [of the Judiciary Act of 1789], which relate to jurisdictional issues, were Ellsworth’s creation. . . . Ellsworth was the main architect of the bill. . . . He also authored the extremely important Section 25 . . .”).

68. The Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86 (codified as amended at 28 U.S.C. § 1257).

69. The Supreme Court described the operation of section 25 of the Judiciary Act of 1789 in detail in 1840. See *Kentucky v. Griffith*, 39 U.S. (14 Pet.) 56, 57–58 (1840) (“The question depends altogether upon the construction of the second clause of the twenty-fifth section of the act of 1789,

courts original jurisdiction and the Supreme Court appellate jurisdiction to review the constitutionality of potentially thousands of Congressional laws when the highest state court had upheld its constitutionality.

Ellsworth and the First Congress used its powers over federal court jurisdiction very aggressively,⁷⁰ and that decision has vestiges in current law even today. As a leading treatise pointed out, “Beginning with the first Judiciary Act in 1789, Congress has never vested the federal courts with the entire ‘judicial Power’ that would be permitted by Article III.”⁷¹ As scholars of federal court jurisdiction have observed:

[T]he 1789 [Judiciary] Act . . . made no use of the grant of judicial power over cases arising under the Constitution or laws of the United States . . . In the category of cases arising under federal law, Congress provided no general federal question jurisdiction in the lower federal courts. Nor, under section 25, did the Supreme Court’s appellate jurisdiction extend to cases originating in the state courts in which the federal claim was *upheld*.⁷²

As another commentator has written, “Under the Judiciary Act of 1789, cases could arise that clearly fall within the judicial power of the United States but that were excluded from the combined appellate and original jurisdiction of the federal courts[,]” including cases in which a state court erroneously voided a state statute for violating the Federal Constitution.⁷³ In sum, “the first Congress’s allocation of jurisdiction in the Judiciary Act is *inconsistent* with the thesis that the Constitution requires the entire judicial

which provides that the final judgment or decree of the highest Court of Law or Equity in a state, in which a decision could be had, may be re-examined in this Court upon a writ of error, ‘where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favour of such their validity.’ Under this clause of the act of Congress, three things must concur to give this Court jurisdiction. 1. The validity of a statute of a state, or of an authority exercised under a state, must be drawn in question. 2. It must be drawn in question upon the ground that it is repugnant to the Constitution, treaties, or laws of the United States. 3. The decision of the state Court must be in favour of their validity.” (quoting The Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85 (codified as amended at 28 U.S.C. § 1257)).

70. See CASTO, CREATION, *supra* note 62, at 65 (“[T]he Constitution provided a mechanism for limiting the Supreme Court’s potentially immense appellate power. The Court’s appellate jurisdiction was subject to ‘such exceptions, and under such regulations as the Congress shall make.’ Ellsworth had been a member of the Committee of Detail that added this clause to the Constitution, and he fully understood the clause’s potential reach. He made extensive use of this grant of legislative authority.”).

71. FALLON ET AL., *supra* note 17, at 349.

72. See *id.* at 29.

73. William R. Casto, *The First Congress’s Understanding of Its Authority Over the Federal Courts’ Jurisdiction*, 26 B.C.L. REV. 1101, 1118 (1985) [hereinafter Casto, *First Congress’s Understanding*].

power of the United States to be vested in the aggregate in the Supreme Court and lower federal courts.”⁷⁴

Section 25 of the Judiciary Act of 1789 reflected the view Ellsworth expressed during the ratification debates. Advocating for Connecticut's adoption of the Constitution, Ellsworth wrote that “nothing hinders . . . that all the cases, except the few in which it [the Supreme Court] has original and not appellate jurisdiction, may in the first instance be had in the state courts.”⁷⁵ Also during those debates, Ellsworth wrote that a review of cases beyond the state courts would be subject to regulation by Congress, stating, “We are further told ‘that the judicial departments, or those courts of law, to be instituted by Congress, will be oppressive.’ . . . [Yet such] courts are not to intermeddle with your internal policy, and will *have cognizance only of those subjects which are placed under the control of a national legislature*.”⁷⁶ Ellsworth further wrote that the judiciary under the Constitution “extends only to objects and cases specified” by authorities other than the judiciary itself, namely the Constitution and Congress.⁷⁷

Section 25 also reflected the views of William Paterson of New Jersey, who, along with Ellsworth, was a principal drafter of the Judiciary Act of 1789.⁷⁸ So clear was the power of Congress over the jurisdiction of the federal courts in 1789 that Paterson wrote that “[e]ver since the Adoption of the Const[itution] I have considered federal Courts of *subordinate Jurisd[iction]* . . . *inevitable*.”⁷⁹

Section 25 reflected the views of Roger Sherman as well. Sherman, who served alongside Ellsworth as one of Connecticut's first two Senators, and whom eminent historian Clinton Rossiter considered one of the most influential members of the Constitutional Convention,⁸⁰ wrote that:

74. *Id.* at 1120 (emphasis added).

75. Oliver Ellsworth, *Letter to the Landholders and Farmers* (Dec. 10, 1787) in THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 575, 578 (E.H. Scott ed., 1894).

76. Oliver Ellsworth, *Letters of a Landholder, V*, in ESSAYS ON THE UNITED STATES CONSTITUTION, at 159 (Paul Leicester Ford ed., 1892) (emphasis added).

77. Oliver Ellsworth, *Letters of a Landholder, VI*, in ESSAYS ON THE UNITED STATES CONSTITUTION, *supra* note 76, at 164.

78. Casto, *First Congress's Understanding*, *supra* note 73, at 1105 (noting that “Paterson acted as [Ellsworth's] principal lieutenant” in drafting the Judiciary Act of 1789).

79. *Id.* at 1133 (reprinting in Appendix C Paterson's notes for a speech given on the Senate floor on June 23, 1789) (emphasis added). Johnson's Dictionary, first published in 1755 and one of the most influential dictionaries of the English language, defined “subordinate” as “inferiour in order, subject.” JOHNSON'S DICTIONARY 328 (Charles J. Hendee ed., 1836).

80. See CLINTON ROSSITER, 1787: THE GRAND CONVENTION, ch. 10 (1966).

It was thought necessary in order to carry into effect the laws of the Union, to promote justice, and preserve harmony among the states, to extend the judicial powers of the United States to the enumerated cases, under such regulations and with such exceptions as shall be provided by law, which will doubtless *reduce them* to cases of such magnitude and importance as cannot safely be trusted to the final decision of the courts of particular states⁸¹

B. The Pro-Federal Government Policy of Section 25 of the Judiciary Act of 1789

Not only did section 25 of the Judiciary Act of 1789 prohibit federal court review of a certain class of cases, but it did so pursuant to a policy that explicitly protected federal statutory law and other federal claims from attack by state and federal courts. As historian William Casto has observed, “the drafters of the Judiciary Act viewed the federal courts as *a tool to effect specific substantive results*. . . . To a significant degree, they shaped the federal courts’ jurisdiction to assure that specific parties would prevail in specific categories of litigation.”⁸²

Section 25 comported with Ellsworth’s expressed views during the ratification debates, where he made clear that the proposed Constitution was necessary to create a more energetic system that could enforce national interests, especially those national powers required for “raising and supporting armies [to] protect the people against the violence of wicked and overgrown citizens, and invasion by the rest of mankind. . . . This power is also necessary to restrain the violence of seditious citizens. . . . A people cannot long retain their freedom, whose government is incapable of protecting them.”⁸³ Ellsworth also argued that “[i]n all these matters and powers given to Congress, their ordinances must be the supreme law of the land, or they are nothing.”⁸⁴

81. Roger Sherman, *Observations on the New Federal Constitution* (A Citizen of New Haven, II) (Dec. 25, 1788), reprinted in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES*, *supra* note 76, at 240–41 (emphasis added). Sherman also clearly recognized that Congress need not create any lower federal courts at all, writing, “[T]he constitution does not make it necessary that any inferior tribunals should be instituted, but it *may* be done, if found necessary” *Id.* at 241 (emphasis added).

82. CASTO, *EARLY REPUBLIC*, *supra* note 59, at 52 (emphasis added).

83. Oliver Ellsworth, *Letters of a Landholder, V*, in *ESSAYS ON THE UNITED STATES CONSTITUTION*, *supra* note 76, at 156–57.

84. *Id.* at 160. The safety valve created by section 25—in which federal courts would have an opportunity to overturn state court decisions that ruled against assertions of rights under federal law but not to overturn state court decisions that upheld assertions of rights under federal law—was foreshadowed by James Madison during the ratification debates, in which he stated he believed the time had not yet come when state courts could be trusted to wholly decide federal issues. In 1788,

In a series of early decisions, the Supreme Court made clear its understanding of the Founders' distrust of state courts' willingness to uphold federal legislation, as expressed in the Judiciary Act of 1789.⁸⁵ Chief Justice Taney wrote in *Bank of Kentucky v. Griffith*:⁸⁶

The policy of this distinction [made under section 25] is obvious enough. The power given to the Supreme Court by this act of Congress was intended to protect the general government in the free and uninterrupted exercise of the powers conferred on it by the Constitution, and to prevent any serious impediment from being thrown in its way while acting within the sphere of its legitimate authority. The right was therefore given to this Court to re-examine the judgments of the state Courts, where the relative powers of the general and state government had been in controversy, and the decision had been in favour of the latter. It may have been apprehended that the judicial tribunals of the states would incline to the support of state authority, against that of the general government But when, as in the case before us, the state authority or state statute is decided to be unconstitutional and void in the state tribunal, it cannot under that decision come in collision with the authority of the general government; and the right to re-examine it here is not necessary to protect this government in the exercise of its rightful powers. In such a case, therefore, the writ of error is not given; and the one now before us must be dismissed for want of jurisdiction.⁸⁷

A few decades later, in *Murdock v. City of Memphis*,⁸⁸ the Court reiterated its understanding of Congress's power to limit federal court jurisdiction in the manner in which it did in 1789. In that case, the Court stated:

James Madison said, "It will also be in the power of Congress to vest this [judicial] power [over federal issues] in the state courts, both inferior and superior. This they will do, when they find the tribunals of the states established on a good footing." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 536 (Jonathan Elliot, ed., 2d ed. 1866) [hereinafter THE DEBATES IN THE SEVERAL STATE CONVENTIONS].

85. Chief Justice Marshall put it this way: "It would be hazarding too much to assert, that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 386–87 (1821).

86. 39 U.S. (14 Pet.) 56 (1840).

87. *Id.* at 58.

88. 87 U.S. (20 Wall.) 590 (1874).

[I]t is only upon the existence of certain questions in the case that this court can entertain jurisdiction at all. Nor is the mere existence of such a question in the case sufficient to give jurisdiction—the question must have been *decided* in the State court. Nor is it sufficient that such a question was raised and was decided. It must have been decided in a certain way, that is, against the right set up under the Constitution, laws, treaties, or authority of the United States. *The Federal question may have been erroneously decided. It may be quite apparent to this court that a wrong construction has been given to the Federal law, but if the right claimed under it by plaintiff in error has been conceded to him, this court cannot entertain jurisdiction of the case, so very careful is the statute [of 1789] to narrow, to limit, and define the jurisdiction which this court exercises over the judgments of the State courts.*⁸⁹

And seventeen years later, the Supreme Court stated in *Missouri v. Andriano*:⁹⁰

While there is some force in the argument that the right of review in cases involving the construction of a federal statute should be mutual, the act limits such right to cases where the state court has decided *against* the title, right, privilege or immunity set up or claimed under the [federal] statute. . . .

The object of the present judiciary act was not to give a right of review wherever the validity of an act of Congress was drawn in question, but to prevent the courts of the several States from impairing or frittering away the authority of the federal government, by giving a construction to its statutes adverse to such authority. Of course, if the construction given by the state court to the act under which the right is claimed be favorable to such right, no such reason exists for a review by this court.⁹¹

More recently, Justice Frankfurter wrote in 1939 that “Section 25 of the First Judiciary Act gave reviewing power to this Court only over state court decisions *denying* a claim of federal right. This restriction was, of course, born of fear of disobedience by the state judiciaries of national authority.”⁹² The motivation behind the policy embedded in section 25 had long been acknowledged by state supreme courts as well.⁹³

89. *Id.* at 626 (second emphasis added).

90. 138 U.S. 496 (1891).

91. *Id.* at 499–500.

92. *Coleman v. Miller*, 307 U.S. 433, 466 n.6 (1939).

93. The Pennsylvania Supreme Court noted:

Finally, legal scholars in the twentieth-century also recognized the substantive preference for federal law embedded in section 25.⁹⁴

[T]he appellate jurisdiction of [the Supreme Court] extends no further than to cases in which the judgment is in favour of the legislation or authority to which the federal constitution, or an Act of Congress, is supposed to be repugnant; in other words, it extends no further than is necessary to maintain the supremacy of federal [law].

Moore v. Chadwick, 8 Watts & Serg. 49, 53 (Pa. 1844). And as the Chief Justice of the Wisconsin Supreme Court described the views of those who opposed the policy embodied in section 25 of the Judiciary Act of 1789, such opponents:

[found] fault with congress for what is said to be a distinction invidious to the state tribunals made by the statute under consideration, by which it is said that the decision of the state tribunals, if they are in favor of the validity of a law of congress, [] are presumed to be right, and no appeal is given, but if such decisions are against the validity of such law, then they are presumed to be wrong, and therefore an appeal is given.

Abelman v. Booth, 1859 WL 5159, *12 (Wis. 1859).

94. Writing in 1908, before he was elected President in 1912, Woodrow Wilson observed:

A litigant in a state court may contend, for example, that some statute, or even some constitutional provision, of the state, under which his opponent is suing him or making defense, is inconsistent with the Constitution of the United States. If the court uphold him in this contention and treat the law which he challenges as null and void because inconsistent with federal law, there is an end of the matter. The court has upheld federal law against the law of the state, and no appeal can be taken to a court of the United States,—which could do no more. But if the court disallow the plea and declare the state law valid notwithstanding its alleged conflict with the law of the United States, the defeated litigant may take an appeal to the courts of the United States; for with a federal tribunal must lie the final determination of the conflict, lest the state court might have been biased in favor of the law and privilege of the state under whose authority it acted.

WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 156 (1917).

The American Bar Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation described the policy behind section 25 of the Judiciary Act of 1789 as follows:

The historic reason for the limitation in the original Judiciary Act, to wit, that the writ of error should only be permitted where the decision in the state court had been adverse to the claimant, was this: It was thought that the main ground for giving the jurisdiction was that there might be a jealousy of the federal government on the part of the state courts.

Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, 34 ANN. REP. OF A.B.A. 448, 463 (1911); see also FRANKFURTER & LANDIS, *supra* note 10, at 190–91 (“Fear of disobedience of national authority by state judiciaries determined this legislation [the Judiciary Act of 1789]. The framers of the Judiciary Act guarded against the danger of state judges whose inclination towards support of action by their ‘sovereign states’ would lead them to be unmindful of the national interest as expressed in the Constitution, laws and treaties of the United States.”).

And Professor Wright has observed:

From 1789 to 1914 [when section 25 of the Judiciary Act of 1789 was substantively amended] the jurisdiction over state courts was limited to cases in which the state court had held some federal act invalid, or had upheld the validity of a state act against a claim based on the federal Constitution or laws. The Supreme Court could not review a state-court decision that upheld the federal claim and found a state act invalid. . . . The reason for such a distinction was clear enough. When the state court had yielded to the authority of the federal government, and had held its own statute invalid, appeal to the Supreme

C. *Support for the Judiciary Act of 1789 in the First Congress*

In the first Congress, fifty-four members had been delegates to the Constitutional Convention or their state ratification conventions.⁹⁵ When the Judiciary Act of 1789 was brought up for a vote in the First Congress, neither that group nor any other Member of Congress expressed any concerns that it exceeded Congress's constitutional authority over the federal courts.

James Madison spoke in favor of the Act during House debate on the legislation.⁹⁶ At the conclusion of the debate, Madison gave the legislation his endorsement and voted for it.⁹⁷ Although there is no roll call vote on passage of the Judiciary Act of 1789 in the House recorded in the Congressional Record,⁹⁸ "[t]he principal defenders of the [Judiciary Act of 1789 in the House] were the foremost men in the chamber,—Madison, Sherman, Ames and Sedgwick, of Massachusetts, Benson and Lawrence, of New York, and William Smith of South Carolina."⁹⁹ The Act also passed the Senate by a vote of 14–6, with eight of the ten former delegates to the Constitutional Convention voting for it.¹⁰⁰

Court was thought unnecessary to protect the federal government in the exercise of its rightful powers.

CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 779–80 (5th ed. 1994); see also Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954) ("The prime function envisaged for judicial review—in relation to federalism—was the maintenance of national supremacy against nullification or usurpation by the individual states . . .").

95. *ENCYCLOPEDIA OF AMERICAN HISTORY* 145 (Richard B. Morris ed., 6th ed. 1982).

96. See 1 *ANNALS OF CONG.* 843–44 (Joseph Gales ed., 1834) (supporting the creation of lower federal courts on the grounds that "a review of the constitution of the courts in many States will satisfy us that they cannot be trusted with the execution of the Federal laws").

97. See *Gazette of the United States*, Sept. 19, 1789, at 3, col. 2 ("Mr. Madison and Mr. Benson made a few observations . . . [The bill] is as good as we can at present make it . . . [T]he bill had been in existence many months—had been printed for the inspection of the members, and had been a long time in their hands.—That it had undergone a lengthy discussion in committee . . .") (also recording Madison voting "aye" on the bill).

98. See 1 *ANNALS OF CONG.* 928–29 (Joseph Gales ed., 1834) ("The bill for establishing the Judicial Courts of the United States was read the third time and passed.").

99. See *BROWN*, *supra* note 16, at 196.

100. See 1 *ANNALS OF CONG.* 51 (Joseph Gales ed., 1834) (Bassett, Ellsworth, Few, Johnson, Morris, Paterson, Read, and Strong voting for, Butler and Langdon voting against). While one cannot know from such votes whether those voting against it did so because they believed it was unconstitutional, surely no one who voted for it did so believing it was unconstitutional. Senate debates were closed to the public during its early years, and no official records of Senate debates exist prior to the time it passed a motion to make its proceedings a matter of public record in 1794. See *Senate Journals*, 3d. Cong., 1st Sess., 33. The debates were not published until after Ellsworth had left the Senate. See *BROWN*, *supra* note 16, at 181.

Shortly after the Judiciary Act of 1789 was enacted into law, Congress asked Edmund Randolph, former delegate to the Constitutional Convention from Virginia and the first Attorney General of the United States, to submit a report and recommendation on "matters relative to the

D. Cases Dismissed Under Section 25 of the Judiciary Act of 1789

The Supreme Court dismissed many cases under section 25 of the Judiciary Act of 1789, and in doing so it never expressed any concerns regarding its constitutionality.

Felix Frankfurter and James Landis identified sixteen cases between 1789 and 1914 in which the Supreme Court denied jurisdiction because the state court had upheld a federal claim or defense.¹⁰¹ In many of these cases, constitutional issues were raised, but the Supreme Court still dismissed them under section 25.¹⁰² The Court relied on this limitation of its jurisdiction in

administration of justice under the authority of the United States." 2 ANNALS OF CONG. 1760 (Joseph Gales ed., 1834). In that report, Attorney General Randolph clearly recognized the plenary power of Congress to control federal court jurisdiction. Describing the amount in controversy limitation, discussed later, for example, Randolph wrote, "The Supreme Court, though inherent in the Constitution, was to receive the first motion from Congress; [and] the inferior courts must have slept forever without the pleasure of Congress. Can the sphere of authority over [amount in controversy jurisdiction] be more enlarged?" 1 AM. STATE PAPERS (MISC.) 34 n.6 (1834).

101. See FRANKFURTER & LANDIS, *supra* note 10, at 190 n.20. The cases cited by Frankfurter and Landis are *Baker v. Baldwin*, 187 U.S. 61 (1902); *Kizer v. Texarkana & Ft. Smith Ry.*, 179 U.S. 199 (1900); *De Lamar's Nev. Gold Mining Co. v. Nesbitt*, 177 U.S. 523 (1900); *Jersey City & Bergen R.R. v. Morgan*, 160 U.S. 288 (1895); *Missouri ex rel. Carey v. Andriano*, 138 U.S. 496 (1891); *Ryan v. Thomas*, 71 U.S. (4 Wall.) 603 (1866); *Roosevelt v. Meyer*, 68 U.S. (1 Wall.) 512 (1863); *Reddall v. Bryan*, 65 U.S. (24 How.) 421 (1860); *Burke v. Gaines*, 60 U.S. (19 How.) 388 (1856); *Linton v. Stanton*, 53 U.S. (12 How.) 423 (1851); *Strader v. Baldwin*, 50 U.S. (9 How.) 261 (1850); *Walker v. Taylor*, 46 U.S. (5 How.) 64 (1847); *Fulton v. M'Affee*, 41 U.S. (16 Pet.) 149 (1842); *Commonwealth Bank v. Griffith*, 39 U.S. (14 Pet.) 56 (1840); *Montgomery v. Hernandez*, 25 U.S. (12 Wheat.) 129 (1827); *Gordon v. Caldcleugh*, 7 U.S. (3 Cranch) 268 (1806).

102. See Brief for Plaintiff in Error, at 1–2, *Baker v. Baldwin* (claim that "the legal tender provisions of the Act of Congress of February 28, 1878 . . . are unconstitutional and void . . . [T]he answer of the defendant specifically insisted that the legal tender provisions of the Act of February 28, 1878, are not within the power of Congress to coin money and regulate the value thereof, and are in conflict with the provision of the Fifth Amendment of the Constitution of the United States, that no person shall be deprived of life, liberty or property without due process of law" and quoting lower court judge as stating, "The sole question presented is whether the act in question making the silver dollar of 412.5 grains troy of standard silver a full legal tender for all debts and dues, public and private, is constitutional.") (on file with author); Statement of Case, Brief and Argument on behalf of Plaintiff in Error at 7, *Missouri v. Andriano*, No. 127 (Oct. 18, 1887) ("[I]t appearing that the constitutional questions so presented were, by the highest court of the State, decided adversely to plaintiff in error, the revising power of this Court is properly invoked.") (on file with author); Brief of Defendant in Error, On Motion to Dismiss the Writ of Error at 3, 5, *Roosevelt v. Meyer* ("The plaintiff in error thereupon brings this writ of error under the 25th section of the judiciary act of 1789, and the defendant in error now moves to dismiss the writ on the ground that this Court has no jurisdiction under the 25th section of said act, inasmuch as the highest court of law and equity of the State, in which a decision in the suit could be had, decided *in favor* of the validity of the act of Congress of 25th of February, 1862, which was the only statute of the United States drawn in question in the case. . . . The question regarding the validity of any act of Congress will always involve the construction of one or more sections of the Constitution. The validity of an act depends upon the power of Congress to pass it, and this power depends upon the Constitution, as the source

its decisions in several other cases as well,¹⁰³ and in at least one of those additional cases constitutional issues had been raised.¹⁰⁴

Even by 1874, the Supreme Court had dismissed so many cases under section 25 that it remarked, in *Murdock v. City of Memphis*:¹⁰⁵

The twenty-fifth section of the act of 1789 has been the subject of innumerable decisions, some of which are to be found in almost every volume of the reports from that year down to the present. These form a system of appellate jurisprudence relating to the exercise of the appellate power of this court over the courts of the States.¹⁰⁶

of all its powers. Either party in any suit, where such a question arises, must claim under some section of the Constitution, for or against the validity of the act.”) (on file with author).

103. See, e.g., *Iowa v. Rood*, 187 U.S. 87, 93–94 (1902) (dismissing writ of error because the decision below was not adverse to a right claimed under federal law); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 635–38 (1874) (relying in part on the rule that its jurisdiction does not extend to state court judgments upholding federal rights); *McIntire v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813) (explaining that limitations on the circuit court’s jurisdiction meant that federal questions would arise in state courts, subject to review in the Supreme Court when the federal right is denied, noting that Congress thought this “sufficient at present for all the political purposes intended to be answered” by Article III).

104. *Iowa*, 187 U.S. at 91, 93–94 (1902) (“The real question then is whether the sovereignty of the State over the beds of its inland lakes rests upon some statute or provision of the Constitution, or upon general principles of the common law which long antedated the Constitution, and had their origin in rights conceded to the Crown centuries before the severance of our relations with the mother country . . . Had the decision of the [state] Supreme Court been adverse to the plaintiffs, who claimed title under the swamp land act, it is possible that a writ of error might have lain from this court, but we have frequently held that to sustain such writ, the decision must be adverse to a right claimed under an act of Congress, or to the exercise of an authority granted by the United States.”); see also Brief in Error to the Supreme Court of the State of Iowa at 94, *Iowa v. Rood*, No. 17,738 (Iowa May 5, 1900) (Transcript of Record) (“The court erred in holding that the Constitution of the United States . . . prohibited the State of Iowa from questioning the legality of the acts of the Land Commissioner . . .”) (on file with author).

105. 87 U.S. (20 Wall.) 590 (1874).

106. *Id.* at 630. Despite the widespread enforcement of the Judiciary Act of 1789’s limitation on the Court’s jurisdiction, Professor Akhil Amar has argued that this limitation, which is based on a distinction between a state decision that denies a federal claim or defense and one that upholds such a claim or defense “is largely, and perhaps wholly, an optical illusion.” Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1530 (1990). Amar writes that “[i]n virtually every case in which one party argues for a federal ‘right,’ the other side can argue that it has a federal ‘immunity’—which is simply another way of saying that one’s opponent has no federal right.” *Id.* According to this view, the sixteen cases identified by Frankfurter and Landis in which the Supreme Court denied jurisdiction because the state court had upheld the federal claim or defense only illustrate that section 25 of the Judiciary Act was “a trap for unwary lawyers, for it required them to package their claims of error with great care.” *Id.* at 1531. But as Professor Daniel Meltzer has pointed out, “Amar’s usage seems more than a bit unconventional” by viewing an “immunity” as equivalent to the lack of a claim. Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1588–89 (1990). Indeed, the Supreme Court itself explicitly rejected Professor Amar’s equivalency argument, explaining in one case that the defendant’s contention was “only a denial of the claim by [the] plaintiff” and that “although denying plaintiff’s

VII. THE POLICY BEHIND THE 1914 AMENDMENTS TO SECTION 25 OF THE JUDICIARY ACT OF 1789

Congress did not grant a more general federal question authority to the lower federal courts until after the Civil War,¹⁰⁷ and Congress did not grant the Supreme Court the authority to review state court rulings upholding claims of federal right until 1914.¹⁰⁸ Until 1914, then, neither the Supreme Court nor the lower federal courts could review the constitutionality of potentially thousands of federal laws.

Until section 25 of the Judiciary Act of 1789 was amended to enlarge the federal courts' jurisdiction, controversy occasionally surrounded its unique method of allowing the review of some constitutional and other legal challenges, but not others. Decisions of state courts striking down popular legislation under federal constitutional provisions, which could not be appealed to federal courts, were condemned in states such as Kentucky and

claim, [the] defendant did not pretend to set up any right it had under any statute of the United States." *Jersey City & Bergen R.R. v. Morgan*, 160 U.S. 288, 292–93 (1895). Even earlier, in *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874), the Court reiterated that it could not review state decisions that upheld federal rights under the carefully worded Judiciary Act of 1789:

Nor is it sufficient that [a federal question] was raised and was decided. It must have been decided in a certain way, that is, against the right set up under the Constitution, laws, treaties, or authority of the United States. The Federal question may have been erroneously decided. It may be quite apparent to this court that a wrong construction has been given to the Federal law, but if the right claimed under it by plaintiff in error has been conceded to him, this court cannot entertain jurisdiction of the case, so very careful is the statute, both of 1789 and of 1867, to narrow, to limit, and define the jurisdiction which this court exercises over the judgments of the State courts.

Murdock, 87 U.S. (20 Wall.) at 626. And in 1863, counsel made the following point that counters Professor Amar's essential argument:

The question regarding the validity of any act of Congress will always involve the construction of one or more sections of the Constitution. The validity of an act depends upon the power of Congress to pass it, and this power depends upon the Constitution, as the source of all its powers. Either party in any suit, where such a question arises, must claim under some section of the Constitution, for or against the validity of the act. If the decision is in favor of the validity, it may, in one sense, be said that what the other party claimed, was disallowed.

If the overruling of such claims could answer the provisions of the 25th section to give this Court jurisdiction, *then the first subdivision might be rendered nugatory in any case by a certificate of the court below, similar to that in the present case.*

Brief of Defendant in Error, on Motion to Dismiss the Writ of Error at 5, *Roosevelt v. Meyer*, 68 U.S. (1 Wall.) 512 (1863) (emphasis added) (on file with author). In that case, the Supreme Court agreed with counsel and dismissed the case as beyond its jurisdiction under the Judiciary Act of 1789. See *Roosevelt v. Meyer*, 68 U.S. (1 Wall.) 512 (1863).

107. See Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (1875).

108. See Judiciary Act of 1914, ch. 2, 38 Stat. 790 (1914).

New York.¹⁰⁹ Proposals were also made to make it more difficult for the Supreme Court to strike down state statutes or acts of Congress, even when it had jurisdiction to hear an appeal from a state court.¹¹⁰ By 1859, the Chief Justice of the Wisconsin Supreme Court was led to write, regarding the debate concerning whether state or federal courts, or some other entity, should be the final arbiters regarding whether federal provisions violated state laws, that “we have arrived at a point in our system of double allegiance, where ‘fidelity to the state is treason to the United States, and treason to her, fidelity to them’”¹¹¹

In the end, commentators agree that the 1914 amendment to the Judiciary Act of 1789, which expanded the jurisdiction of the Supreme Court to cover state judgments upholding federal claims and defenses, was “prompted largely by the decision in *Ives v. South Buffalo R[ailwa]y*,”¹¹²

109. See Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 3 (1913) (“In 1819, to avert complete financial ruin of the debtor classes, the Kentucky Legislature passed various laws staying levy of executions In 1820, the Kentucky Court of Appeals held these statutes unconstitutional as impairing the [federal] obligation of contract. The decisions were followed by violent protests No appeal, however, to the United States Supreme Court was possible.”); see also *id.* at 2 (“The [1911] decision of the New York Court of Appeals in the *Ives* case invalidating the New York form of a workman’s compensation law [under the federal constitution], has given an especial impetus to the feeling that some method ought to be found by which an appeal from such a decision might be taken to the National Supreme tribunal.” (citing *Ives v. South Buffalo Ry. Co.*, 201 N.Y. 276 (1911))).

110. *Id.* at 27, 33 (“[In 1823] Senator Johnson of Kentucky introduced a resolution to instruct the Judiciary Committee to inquire into the expediency of amending the Judiciary Act so as to require concurrence of seven judges in any opinion involving the validity of State statutes or acts of Congress. . . . On March 11, 1824, Senator Martin Van Buren reported a bill which, as amended, provided for concurrences by seven judges out of ten, and required each judge to express and record a separate opinion. . . . [On] January 21, 1829[,] the Judiciary Committee of the House of Representatives, through Philip P. Barbour of Virginia . . . reported a bill requiring concurrence of five judges out of seven in holding any legislative act or State constitution to be invalid. The report was a somewhat vigorous assault on the Supreme Court”); see also 4 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 396 n.1 (noting Senator Webster’s remarks that “I shall call up some bills reported by our [Judiciary] committee. . . . The gentlemen of the West will propose a clause, requiring the assent of a majority of all the judges to a judgment, which pronounces a state law void, as being in violation of the constitution or laws of the United States.” (letter from Representative Daniel Webster to Justice Joseph Story, Apr. 10, 1824)) (alterations in original) (internal quotations omitted); Letter from Justice Story to His Wife (Jan. 28, 1831), in 2 *LIFE AND LETTERS OF JOSEPH STORY* 43 (William W. Story ed., 1851) (“[A] most important and alarming measure [was introduced to repeal the section 25 of the Judiciary Act]. If it should prevail . . . it would deprive the Supreme Court of the power to revise the decisions of the State Courts and State Legislatures, in all cases in which they were repugnant to the Constitution of the United States. So that all laws passed, and all decisions made, however destructive to the National Government, would be utterly without redress. . . . [T]he introduction of it shows the spirit of the times.”). See generally Warren, *supra* note 109, at 3–4 (discussing similar disputes regarding the extent of federal court jurisdiction over state court decisions in Virginia, Ohio, Georgia, South Carolina, California, and Wisconsin).

111. *Abelman v. Booth*, 1859 WL 5159, at *2 (Wis. Dec. 14, 1859).

112. See FALLON, ET AL., *supra* note 17, at 493; see also ROBERT N. CLINTON ET AL., *FEDERAL COURTS: THEORY & PRACTICE* 1369–70 (1996) (“The amendment was a reaction to *Ives*”);

and by the desire to allow federal courts to overturn that and similar decisions. Just as section 25 of the original Judiciary Act of 1789 was based on a desire for certain substantive results from the courts—that is, a preference for upholding federal law—the 1914 amendment that expanded Supreme Court jurisdiction beyond that granted in section 25 was also based on a desire for substantive results—the upholding of state workers' compensation laws.

The story of the achievement of that policy preference is as follows. In *Ives v. South Buffalo Railway*,¹¹³ the New York Court of Appeals struck down the popular New York law that was the first workers' compensation statute in the country on the grounds that it violated the railroad's rights under both the New York and U.S. Constitutions.¹¹⁴ The decision of the New York Court of Appeals, however, could not be reviewed by the U.S. Supreme Court because it was based on a federal defense under the federal Constitution that had been upheld by the state court.¹¹⁵ In response, the citizens of New York amended the state constitution to permit such legislation and reenacted the statute.¹¹⁶ But that still did not clear the way for upholding the New York workers' compensation statute as long as the New York Court of Appeals maintained its view that the statute violated the federal Constitution. This was all the more frustrating for the statute's supporters, because the same year that *Ives* was decided, the Supreme Court upheld the constitutionality of a federal workers' safety law—the Federal Employers' Liability Act—that gave good reason to believe the Court might likewise uphold the New York statute.¹¹⁷ Consequently, the statute's supporters had to find another way to reverse the New York Court of Appeals's interpretation of the federal Constitution.

National legal organizations took up the cause. Starting in 1911, the American Bar Association advocated expansion of the Supreme Court's

GERALD GUNTHER, CONSTITUTIONAL LAW 53 (12th ed. 1991) (remarking that *Ives* "provoked the 1914 change"); 16B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4006, at 121–22 (1977) ("A major expansion occurred in 1914, in reaction to an unpopular decision in which the New York Court of Appeals had held a state workmen's compensation statute invalid under both the federal and state constitutions.").

113. 94 N.E. 431 (N.Y. 1911).

114. *Id.* at 437.

115. See FRANKFURTER & LANDIS, *supra* note 10, at 195 ("[A f]ederal right had been vindicated, not denied. Under the existing appellate jurisdiction there was no way of reviewing the *Ives* result by the Supreme Court.").

116. See N.Y. Cent. R.R. v. White, 243 U.S. 188, 195–96 (1917).

117. See *Mondou v. N.Y., New Haven & Hartford R.R.*, 223 U.S. 1 (1911).

jurisdiction to address cases such as *Ives*.¹¹⁸ The ABA's president, William Howard Taft, along with Elihu Root, a Republican Senator from New York, spoke in favor of the expansion of Supreme Court jurisdiction to hear *Ives* and similar cases before the House Judiciary Committee in 1914.¹¹⁹

Congress, following the ABA's lead,¹²⁰ enacted an amendment to the Judiciary Act of 1789. The legislative history of the 1914 amendment is replete with references to the *Ives* case. The Senate Report stated:

The particular case which best illustrates the reason for [our] action is the *Ives* case in New York

The people of New York have changed their constitution so as to permit of a workmen's compensation law and have passed such a law. They have no means of securing a review by the Supreme Court of the United States of the question . . . because . . . the Judicial Code allows a review by the Supreme Court of the United States only when the decision is adverse to the claim of right under the Federal Constitution.¹²¹

118. See *Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation*, 35 ANN. REP. OF A.B.A. 557, 558 (1912) (reporting that the Committee had "done all in [its] power to procure the passage of these bills").

119. See Elihu Root, *Reforms in Judicial Procedure: Address Before the Judiciary Committee of the House of Representatives* (Feb. 27, 1914), in ADDRESSES ON GOVERNMENT AND CITIZENSHIP 467, 467 (Robert Bacon & James Brown Scott eds., 1916). As Root explained:

There have been some cases in which the decisions of the courts of last resort in states have been in favor of the claim, giving to the provisions of the Federal Constitution an effect which many people think the Supreme Court would not give to those cases. The notable case in that connection is the *Ives* case in New York, regarding the workmen's compensation act. There the Court of Appeals of New York held that the statute which was before them was in violation, both of the New York state constitution and the Fourteenth Amendment of the Federal Constitution. Now, there are many people who think that the Supreme Court of the United States would not have held that that was in violation of the Fourteenth Amendment of the Federal Constitution. The people of New York have amended their constitution so as to obviate the objection made regarding that particular case, but there was no way in which the judgment of the Supreme Court could be obtained on that question, and the people of the state, many of them, have felt that they were resting under a decision giving a more drastic effect to the Federal Constitution than the Supreme Court of the United States, the guardian of that Constitution, itself would have given, and there has been no way to meet that.

Id. at 475-76 (footnotes omitted).

120. The House Report favorably reporting the 1914 amendment concluded:

A special committee from the American Bar Association appointed to use their influence in having remedial legislation enacted by this Congress, composed of men whose eminence in their profession entitle them to be heard by the Committee on the Judiciary and by this Congress, strongly recommend the passage of this bill.

H.R. REP. NO. 63-1222, at 3 (1914).

121. S. REP. NO. 63-161, at 2 (1914).

The Judiciary Act of 1789 was finally amended in 1914¹²² to allow the Supreme Court to review decisions of state courts that upheld various provisions of federal law. And in 1917, as predicted, the Supreme Court upheld the New York workers' compensation law as constitutional.¹²³

It is worth noting that the 1914 amendment to the original Judiciary Act was not only motivated by an explicit policy of using the federal courts to obtain specific results, as was section 25 of the original Act, but was also motivated in part by a desire by some to forestall even more dramatic moves to obtain politically-oriented results, namely efforts, such as those advocated by Theodore Roosevelt, to overturn unpopular court decisions by popular vote. In other words, the 1914 amendment was in part an effort to prevent even more direct control by voters over constitutional decisions.

Evidence that the 1914 amendment to the Judiciary Act was motivated by the fear that, without it, the judiciary would be exposed to even stronger attacks is provided in the House Report on the 1914 amendment.¹²⁴ That report supported enactment of the amendment to forestall demands for even more "radical changes in our organic law."¹²⁵ The House report does not cite any specific proposed "radical changes" it sought to avoid, but surely its drafters were aware of the causes pressed by Theodore Roosevelt at the time. The *Ives* decision was a particular target for Roosevelt's criticism of the judiciary. As president, Roosevelt "had been critical of the judiciary for blocking social legislation and was convinced that no comprehensive program of reform could be achieved unless the courts could be curbed."¹²⁶ After deciding not to seek reelection in 1908, Roosevelt continued his campaign against the courts. In August of 1910, he complained that the Supreme Court was preventing popular legal change, stating that if the Court continued its opposition, it "would upset the whole system of popular government."¹²⁷ And in January of 1912, Roosevelt outlined his plan for

122. It might be noted here that Professor Amar's argument that the *Ives* case could have been reviewed by the Supreme Court under section 25 of the Judiciary Act of 1789 if only litigants had drafted their pleadings carefully enough, *see supra* note 106, seems even more implausible in light of the fact that, in 1914, the American Bar Association, the legal academy generally, and Congress were all convinced that a statutory amendment was required before that could happen.

123. *See* N.Y. Cent. R.R. v. White, 243 U.S. 188 (1917); S. Pac. Co. v. Jensen, 244 U.S. 205 (1917).

124. H.R. REP. NO. 63-1222, at 2 (1914).

125. *Id.*

126. NATHAN MILLER, THEODORE ROOSEVELT: A LIFE 522 (1992).

127. GILBERT E. ROE, OUR JUDICIAL OLIGARCHY 6 (B.W. Heubusch 1912) (quoting Roosevelt).

the popular recall of state judicial decisions.¹²⁸ Such proposals stalled, however, after the 1914 amendment was enacted.

In leading to the upholding of popular workers compensation statutes, the 1914 amendment also had the effect of reducing the drive for additional reforms that would subject courts to even more direct checks by voters at large. Such was the ebb and flow of the balance struck by Congress between the desire for independent courts and the desire for respecting the popular will. It was a balance Congress had been striking since the original Judiciary Act of 1789.¹²⁹

VIII. OTHER POLICY MOTIVATIONS BEHIND THE JUDICIARY ACT OF 1789

Beyond its policy of increasing the chances that federal legislation would be upheld by the courts, the Judiciary Act of 1789 contained several other limitations on federal court jurisdiction based on still other policy motivations. These additional limitations, including amount in controversy restrictions and a prohibition on general federal question jurisdiction in the federal courts, are explored below.

A. *Amount in Controversy Limitation*

The Judiciary Act of 1789 also limited federal court jurisdiction to those diversity cases in which over five hundred dollars was in dispute.¹³⁰ Members of Congress were well aware that the amount in controversy limit in the Judiciary Act of 1789 would prohibit constitutional issues from being decided in federal court. During the debate on the amount in controversy limitation, one senator remarked on the fact that the limitation would preclude federal court review of significant constitutional cases if the sums involved were less than five hundred dollars. According to Paterson's notes

128. See GEORGE E. MOWRY, *THEODORE ROOSEVELT AND THE PROGRESSIVE MOVEMENT* 215–16 (1946) (citing Theodore Roosevelt, *Judges and Progress*, 100 Outlook 42 (Jan. 6, 1912)).

129. Interestingly, Justice Holmes, at the time of the proposed 1914 amendment, introduced yet another possible means of altering that balance. While supporting the proposal that federal courts be granted expanded jurisdiction to review the constitutionality of state statutes, Holmes also indicated that he did not believe dire results would follow from preventing federal courts from reviewing the constitutionality of federal legislation, stating, “I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.” Oliver Wendell Holmes, *Law and the Court*, Speech at a Dinner of the Harvard Law School Association of New York (February 15, 1913), reprinted in *THE ESSENTIAL HOLMES* 147 (Richard A. Posner ed., 1997).

130. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (1789) (codified as amended at 28 U.S.C. § 1257) (“[T]he circuit courts shall have original cognizance . . . of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State.”).

of the Senate debate on the issue, that senator remarked, "If a small Sum [is at issue], it may involve a Question of Law of great Importance Hambden [sic], his a Cause of 20 s/ [shillings]."¹³¹ The reference was to John Hampden's refusal to pay Charles I's ship money tax in which only twenty shillings were involved, but led to litigation testing the King's constitutional authority to rule England without Parliament.¹³²

As William Casto has observed, the five hundred dollar amount in controversy limitation effectively also acted to bar virtually all tort actions at common law from review in the federal courts on any grounds.¹³³ As Casto points out, Oliver Ellsworth would have understood that the amount in controversy limitation would be a significant barrier to tort claims, as he had served on the highest appellate court in Connecticut for four years, and presided over tort claims, none of which involved amounts over five hundred dollars, and most of which involved sums of less than one hundred dollars.¹³⁴

The amount in controversy limitation was also grounded in a policy designed to make it much more difficult for yet another class of cases to be decided by federal courts, namely those brought by British citizens to collect debts owed to them by Americans. Collectively, Americans owed British merchants over four million pounds at the start of the American Revolution,¹³⁵ and throughout the war state courts refused to hear debt cases brought against Americans.¹³⁶ As Casto has written,

131. Casto, *First Congress's Understanding*, *supra* note 73, at 1110, 1138 (reprinting Paterson's Notes in Appendix C) (second alteration in original) (internal quotation marks omitted).

132. *See id.* at 1111 n.76 ("If [Ship Money] could be established as a regular tax which the King was entitled to collect without Parliamentary consent, the fundamental constitutional issue of the century would be decided in favor of the Monarchy.") (quoting C. HILL, *THE CENTURY OF REVOLUTION* 55 (1961) (internal quotation marks omitted)).

133. *See id.* at 1113 ("During the closed Senate debates, the apparent point was made that the lower courts' jurisdiction would extend to 'Money. Merchadize. Land bought and sold. . . . Where Titles are held under different States, each State will endeavor to protect its own Grant. [T]hey should be tried in the federal Court.' Tort actions are notably absent from this list.") (quoting Paterson's Notes, at 1138 (Appendix C)).

134. *See id.* at 1113 & n.93 (citing cases).

135. *See* MATTHEW P. HARRINGTON, JAY AND ELLSWORTH, *THE FIRST COURTS: JUSTICES, RULINGS, AND LEGACY* 130 (2008) ("[C]olonial planters often financed their crops on credit. British merchants provided the sums necessary for seed and other supplies with the expectation that the loans thus extended would be repaid after the harvest. By the time of the American revolution, therefore, American indebtedness to British merchants was in excess of four million pounds During the course of the peace negotiations, the British repeatedly insisted that Americans make good on debts owing to British subjects.").

136. *See id.* at 19 ("Throughout the confederation period, Congress was unable to induce the states to open their courts to the recovery of British debts.").

“[W]idespread . . . opposition to the collection of British debts had played a major role in persuading the Congress to place a five-hundred dollar amount in controversy limitation on the circuit courts’ jurisdiction.”¹³⁷

Congress passed the amount in controversy provision despite the fact that Article IV of the Treaty of Paris, which ended the Revolutionary War in 1784, provided that “[i]t is agreed that creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.”¹³⁸ As Casto has observed, Oliver Ellsworth understood that making it easy for British creditors to recoup their debts from Americans, despite the requirement imposed by Article IV of the Treaty of Paris, “would engender powerful opposition,” and consequently he “agreed to compromise . . . effective enforcement of Article IV of the peace treaty” to facilitate passage of the Judiciary Act of 1789.¹³⁹ Although the five hundred dollar amount in controversy limit did not entirely preclude British debt cases from making their way into federal court, the vast majority of them did not meet the criteria required for federal judicial review,¹⁴⁰ as they did not involve more than five hundred dollars, and, at that time, smaller claims could not be joined together to meet the monetary jurisdictional requirement.¹⁴¹

In still other ways, the Judiciary Act of 1789 made an appeal to the Supreme Court practically impossible, even when it granted the Supreme Court jurisdiction to hear the case.¹⁴²

137. CASTO, *EARLY REPUBLIC*, *supra* note 59, at 98.

138. Definitive Treaty of Peace, U.S.–Gr. Brit., art. 4, Sept. 3, 1783, 8 Stat. 80, 82. As William Casto has written, “the amount in controversy limitation effectively precluded a significant group of British creditors from having a federal court vindicate rights secured by the most important treaty in United States history.” Casto, *First Congress’s Understanding*, *supra* note 73, at 1112 & n.86.

139. CASTO, *CREATION*, *supra* note 62, at 72.

140. *See* CASTO, *EARLY REPUBLIC*, *supra* note 59, at 47 (“In theory, Supreme Court appellate review was available to correct errors in the tremendous number of British claims relegated to the mercy of the state judiciaries. In practice, however, an appeal all the way to the Supreme Court would have been prohibitively expensive in comparison to the size of the claim.”).

141. CASTO, *CREATION*, *supra* note 62, at 72–73 (“In the late twentieth century, five hundred dollars does not seem a very significant limitation, but it was a substantial sum two hundred years ago. . . . The five hundred-dollar limitation would have its most significant impact upon the British debt cases. Although the total debt owed to British creditors was high, the great majority (for some British firms, over 90 percent) of the individual debts was for sums of less than five hundred dollars. Moreover, the technical legal rules that regulated the joinder of claims (common-law pleading) did not permit a plaintiff to try multiple claims in one lawsuit. Therefore, as a practical matter, the amount in controversy limitation barred the great majority of British claims from the new federal courts.”).

142. The case of *West v. Barnes*, 2 U.S. (2 Dall.) 401 (1791), for example, entailed the following circumstances. West lost a lawsuit brought in the Rhode Island circuit court, and he subsequently attempted to file an appeal in the Supreme Court. HARRINGTON, *supra* note 135, at 88. The Judiciary Act of 1789 required that for such an appeal to be perfected, a writ of error would have to be issued by the clerk of the Supreme Court within ten days of the lower court’s decision. *See id.* That requirement was practically impossible for West to meet, considering the difficulties of swift

B. The Absence of a Grant of General Federal Question Jurisdiction

More significantly, Congress also provided the federal courts with no general federal question jurisdiction in the Judiciary Act of 1789,¹⁴³ and without such jurisdiction large numbers of cases would never be subject to appeal to the Supreme Court. As William Casto has observed, "The Senate considered granting the district courts 'complete [jurisdiction] . . . extend[ing] to all Cases at Law and in Equity.' . . . The bill reported by the [Senate] committee, however, did not vest the federal courts with general civil federal question jurisdiction."¹⁴⁴ Instead, the federal circuit courts were vested with jurisdiction according "to the nature of the parties rather than the nature of the dispute[.]"¹⁴⁵ as the Judiciary Act of 1789 ultimately provided:

[T]he circuit courts shall have original cognizance . . . of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum . . . of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.¹⁴⁶

As a result of the Act, "[i]f the United States had a small civil claim against a citizen, [even] the national government was barred from its own courts."¹⁴⁷

travel between Rhode Island and Philadelphia in 1791. *Id.* Consequently, West obtained a writ of error from the clerk of the Rhode Island circuit court instead. *Id.* The case became the first ever to be appealed to the Supreme Court, but it was dismissed. *Id.* Despite the practical impossibility of complying with the ten-day rule, the Court held that it was the job of Congress, not the Court, to amend the statute to provide for a more reasonable period of time in which a writ of error could be issued. *See id.* In dismissing the case, Justice Iredell noted that "[An] inconvenience does indeed exist. It is a very weighty one, and I heartily wish it was in the power of the Court . . . to remove it: but I think it is not." *Id.*; 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 20 (Maeva Marcus ed., 1998). Justice Wilson agreed, noting that any such inconvenience "must be removed by *another* power," as the federal courts "act in the *judicial*, not in the *legislative* department." THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra* at 25. Justice Cushing also remarked that "[i]f inconveniences should arise, in carrying [the legislature's] laws into effect, with them lies the power of correcting the inconveniences, and not with us." *Id.* at 26.

143. *See* FALLON ET AL., *supra* note 17, at 33 (stating that in the Judiciary Act of 1789, "Congress provided no general federal question jurisdiction in the lower federal courts").

144. Casto, *First Congress's Understanding*, *supra* note 73, at 1116 (citing Paterson's Notes at 1138 (Appendix C)).

145. *Id.*

146. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1257).

147. Casto, *First Congress's Understanding*, *supra* note 73, at 1117.

Another consequence was that federal criminal cases could not be appealed to the Supreme Court. Under the Judiciary Act of 1789, the lower federal courts were given general jurisdiction to try federal crimes,¹⁴⁸ but the Supreme Court itself had no appellate jurisdiction over federal criminal cases.¹⁴⁹

IX. EARLY SUPREME COURT PRECEDENTS REGARDING CONGRESS' POWER TO LIMIT FEDERAL COURT JURISDICTION

Given the scant jurisdiction Congress had given federal courts in the Judiciary Act of 1789, and the consensus view that Congress had the constitutional power to provide any degree of jurisdiction, or none at all, to the federal courts excepting only the Supreme Court's constitutionally required original jurisdiction,¹⁵⁰ it is not surprising that the early Supreme Court unhesitatingly recognized that power when cases were brought to it over which it had no Congressionally authorized jurisdiction.

The early justices of the Supreme Court, including Oliver Ellsworth—who became the third Chief Justice of the United States—clearly viewed Congress as having plenary authority over federal court jurisdiction, excluding only the Supreme Court's constitutionally prescribed original jurisdiction over cases affecting ambassadors and other public ministers and consuls, and cases in which a State was a party.¹⁵¹ In *Wiscart v. D'Auchy*,¹⁵² Chief Justice Ellsworth upheld a denial of Supreme Court jurisdiction, stating broadly that:

The Constitution, distributing the judicial power of the *United States*, vests in the Supreme Court, an original as well as an appellate jurisdiction. The original jurisdiction, however, is confined to cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. In all other cases, only an appellate jurisdiction is given to the court; *and even*

148. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. at 76–77 (“[T]he district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas.”).

149. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. at 78–79 (“That the circuit courts shall have . . . exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein.”).

150. See U.S. CONST. art III, § 2.

151. Indeed, as one historian has written recently, “Rather than viewing the [Supreme] Court as a check on the powers of government, it appears that most of the early justices [including Ellsworth] believed that their role was to uphold and support the national government against efforts to weaken its powers.” HARRINGTON, *supra* note 135, at 167.

152. 3 U.S. (3 Dall.) 321 (1796).

the appellate jurisdiction is, likewise, qualified; inasmuch as it is given "with such exceptions, and under such regulations, as the Congress shall make." Here then, is the ground, and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of an appellate jurisdiction, is simply, whether Congress has established any rule for regulating its exercise?¹⁵³

Chief Justice Ellsworth added:

[I]f an appellate jurisdiction can only be exercised by this court conformably to such regulations as are made by the Congress, and if Congress has prescribed a writ of error, and no other mode, by which it can be exercised, still, I say, we are bound to pursue that mode, and can neither make, nor adopt, another. The law may, indeed, be improper and inconvenient; but it is of more importance, for a judicial determination, to ascertain what the law is, than to speculate upon what it ought to be.¹⁵⁴

In *Turner v. Bank of North-America*,¹⁵⁵ the Supreme Court upheld the provision of the Judiciary Act that provided:

that no District or Circuit Court "shall have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favour of an assignee, unless a suit might have been prosecuted in such Court, to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."¹⁵⁶

As counsel noted, Congress passed the Act of 1789 to prevent citizens of the same state from establishing, through collusion, federal court diversity jurisdiction simply by forcing one party of a contract to assign the benefits of a promissory note to a citizen of another state or to an alien.¹⁵⁷ During

153. *Id.* at 327 (second emphasis added).

154. *Id.* at 328.

155. 4 U.S. (4 Dall.) 8 (1799).

156. *Id.* at 9 (quoting Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1257)).

157. *See id.* ("Congress knew, that the English courts had amplified their jurisdiction, through the

oral argument, Chief Justice Ellsworth incredulously asked the counsel who was arguing that the Supreme Court had jurisdiction, “How far is it meant to carry the argument? Will it be affirmed, that in every case, to which the judicial power of the United States extends, the federal courts may exercise a jurisdiction, without the intervention of the legislature, to distribute, and regulate, the power?”¹⁵⁸ Justice Chase agreed with this sentiment, stating:

The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we possess it, not otherwise: and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant.¹⁵⁹

Joseph Story, in his *Commentaries on the Constitution*, confirmed that “the jurisdiction of the courts of the United States is almost wholly under the control of the regulating power of congress,”¹⁶⁰ the sole exception being the Supreme Court’s limited original jurisdiction.

Subsequent Supreme Court decisions similarly included language recognizing Congress’s plenary power over federal court jurisdiction. Those decisions are set out in Appendix A provided at the end of this article.

Some of the most prominent scholars of recent years have continued to recognize Congress’s plenary power over federal court jurisdiction.¹⁶¹ Many

medium of legal fictions; and it was readily foreseen, that by the means of a colourable assignment to an alien, or to the citizen of another state, every controversy arising upon negotiable paper, might be drawn into the federal Courts.”) (argument of counsel).

158. *Id.* at 10 n.1.

159. *Id.* In *Turner*, the issue was whether an endorsement of a note to a citizen of another state would create diversity when the citizenship of the original parties to the note would not. *Id.* at 9–10. The Constitution indicated diversity might result, as it granted the Supreme Court jurisdiction over controversies “between Citizens of different States,” which could include controversies between an original party and an endorsee of a different state. U.S. CONST. art. III, § 2. But the Judiciary Act of 1789 explicitly specified that such a situation did not create diversity. Judiciary Act of 1789, ch. 20, § 11. 1 Stat. at 78–79. In *Turner*, Chief Justice Ellsworth deferred to the Act of Congress even after strong opposing argument for diversity jurisdiction. Counsel arguing that there was in fact diversity jurisdiction as granted by the Constitution stated, “[C]ongress can no more limit, than enlarge, the constitutional grant. In the [Second] section of the [Third] article, the constitution contemplates . . . if the existing controversy is ‘between citizens of different states,’ the judicial power of the United States expressly extends to it.” *Turner*, 4 U.S. at 10.

160. 3 STORY, *supra* note 33, § 1768.

161. See, e.g., Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1038 (1982) (“If the Constitution means what it says, it means that Congress

have also continued to note that the Constitution allows Congress to restrict federal court jurisdiction for virtually any reason, including explicit hostility to the decisions of the federal courts.¹⁶² Congress could potentially exceed this authority only by violating some independent constitutional provision.¹⁶³ Even so, Congress can remove jurisdiction from the Supreme Court, even in a pending case that has been appealed to it, without violating the Constitution. Indeed, the Supreme Court has upheld a statute removing jurisdiction from it in a pending case.¹⁶⁴

can make the state courts . . . the ultimate authority for the decision of any category of case to which the federal judicial power extends.”); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 914 (1984) (“Those who read the exceptions clause broadly with respect to the Supreme Court and who accept the widely held view about broad congressional control of lower federal court jurisdiction find it hard to see anything in article III that would bar congressional action, as a matter of sheer constitutional power, to remand federal constitutional issues for final state court adjudication. Such a scheme seems consistent with the constitutional language and the Framers’ intent”); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) (“Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court’s appellate jurisdiction.”).

162. See Wechsler, *supra* note 161, at 1005–06 (“Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court’s appellate jurisdiction. . . . [E]ven a pending case may be excepted from appellate jurisdiction. . . . There is, to be sure, a school of thought that argues . . . that the supremacy clause or the due process clause of the fifth amendment would be violated by an alteration of the jurisdiction motivated by hostility to the decisions of the Court. I see no basis for this view and think it antithetical to the plan of the Constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as ‘the supreme Law of the Land’”); see also Gunther, *supra* note 161, at 920 (“In my view, the basic structure of article III affords precisely that power to Congress, and that power may even be exercised, as Herbert Wechsler argued years ago, to express disaffection with Court decisions.”).

163. See Gunther, *supra* note 161, at 910, 916 (“[E]ven if Congress can withdraw jurisdiction from the federal courts in a whole class of cases, it cannot allow a federal court jurisdiction but dictate the outcomes of cases, or require a court to decide cases in disregard of the Constitution. . . . Congress [also] could not limit access to the federal courts on the basis of race or of wholly irrelevant criteria such as a litigant’s height, weight, or hair color.”); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 923 (1982) (“Although Congress may possess authority to remove completely from the Supreme Court’s appellate jurisdiction substantive areas of law, it may not instead provide the Court with jurisdiction but direct it to act in an unconstitutional manner or require that the Court interpret the Constitution in a particular way.”). Similarly, if Congress enacted a jurisdictional statute barring access to the federal courts based on race or gender, it would be unconstitutional under the Equal Protection guarantee of the Fifth Amendment’s Due Process Clause. See Bator, *supra* note 161, at 1034 (“[A] statute which said that whites only may resort to the district courts would be invalid.”). Also, Congress cannot remove cases from the Supreme Court’s constitutionally prescribed original jurisdiction.

164. See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512–15 (1868) (holding that repeal of the Act

X. THE PROCESS ACT OF 1789 AND FEDERAL COURT PROCEDURE

The First Congress not only severely limited the jurisdiction of the federal courts, but it also dictated what procedures the federal courts would employ, allowing them no wiggle room to deviate. And as the federal courts have said many times, the specific procedural rules employed can often dictate substantive results.¹⁶⁵

The Judiciary Act of 1789, as crafted by Oliver Ellsworth and as adopted by Congress, contained many procedural provisions applicable to “all the said courts of the United States.”¹⁶⁶ Those provisions related to the granting of new trials, the administration of oaths, the punishment of contempt by fine or imprisonment, and provisions “to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.”¹⁶⁷ The latter clause appeared to provide the federal courts with nearly unlimited

of February 5, 1867 deprived the Supreme Court of hearing an appeal of a lower court decision in a pending habeas case) (“It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred ‘with such exceptions and under such regulations as Congress shall make.’ . . . The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus* is expressly repealed [by the Act of Congress under consideration]. It is hardly possible to imagine a plainer instance of positive exception. We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words. What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle. . . . It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.”).

165. See, e.g., *Olympic Sports Prods., Inc. v. Universal Athletic Sales Co.*, 760 F.2d 910, 914 (9th Cir. 1985) (“[A] court should note that every procedural rule may, at some point in litigation, be outcome-determinative”); *Jones v. W.J. Services, Inc.*, 970 F.2d 36, 37 (5th Cir. 1992) (“The interplay of several procedural rules determines the outcome of this case.”); *In re Parr*, 165 B.R. 677, 682–83 (“It is obvious that, at times, procedural rules can have substantive, even outcome-determinative, results”).

166. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (codified as amended at 28 U.S.C. § 1257). For detailed accounts of the Judiciary Act’s legislative history, see CASTO, *EARLY REPUBLIC*, *supra* note 59, at 27–53; 1 JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 457–508 (1971).

167. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. at 83. Other provisions of the Judiciary Act of 1789 granted all courts of the United States the “power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law,” § 14, 1 Stat. at 81–82, as well as the power to require, upon motion, that parties produce pertinent books and writings in actions at law. § 15, 1 Stat. at 82. The Act also established the conditions under which depositions could be taken and used at trial, § 30, 1 Stat. at 88–90, and the process for appealing from district, circuit, and state court judgments. § 22, 1 Stat. at 84–85; § 25, 1 Stat. at 85–87.

discretion over their own procedures. The Senate ultimately was reluctant to allow the courts such control,¹⁶⁸ and five days after passage of the Judiciary Act of 1789, Congress promptly approved the Process Act of 1789.¹⁶⁹

A. The Process Act of 1789

The Process Act removed federal court discretion over its procedures and required each federal trial court in actions at common law to adopt the "modes of process" then in effect in the state courts of the state in which the federal court was situated. The Process Act provided, in pertinent part:

That until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.¹⁷⁰

Federal courts interpreted the Process Act to require them to follow state court rules not only in the form of the processes they issued but also in the procedures they employed.¹⁷¹

Again, Oliver Ellsworth was the primary architect of both the Judiciary and Process Acts of 1789,¹⁷² and the Process Act was the work of the same committee that drafted the Judiciary Act of 1789, which included Ellsworth.¹⁷³

In its original form, the Process Act was much more detailed in its regulations, specifying the manner in which parties could commence actions, the forms of summonses, the method of and time for service, the length of time defendants had to answer, the entry of default judgments, and the

168. See 1 GOEBEL, *supra* note 166, at 537 ("It is clear . . . that the Senate was not prepared to permit the regulation of process to be settled by the [federal] courts pursuant to the rule-making power conveyed by section 17 of the Judiciary Act.").

169. Process Act of 1789, ch. 21, 1 Stat. 93. The Judiciary Act was approved on September 24, 1789, *see* ch. 20, 1 Stat. 73, and the Process Act was approved on September 29, 1789, *see* ch. 21, 1 Stat. 93.

170. Process Act of 1789, ch. 21, § 2, 1 Stat. at 93.

171. See 1 GOEBEL, *supra* note 166, at 514, 575.

172. See CASTO, *EARLY REPUBLIC*, *supra* note 59, at 27–53; CURRIE, *supra* note 59, at 47.

173. See 1 GOEBEL, *supra* note 166, at 509.

means of issuing executions.¹⁷⁴ However, the Process Act as ultimately enacted came to reflect the compromise of having each federal court strictly follow the procedure of the state in which it sat.¹⁷⁵ Those who favored the adoption of state procedure ultimately prevailed over those who favored a standardized code of uniform federal procedure.¹⁷⁶

That Congress was understood to have plenary power over federal court procedure as well as federal court jurisdiction was made clear by Alexander Hamilton in *Federalist No. 83*, in which he wrote Congress's "power to constitute courts is a power to prescribe the mode of trial . . ."¹⁷⁷ The Process Act of 1789, probably not coincidentally, uses a similar term, "modes of process," to describe the range of court procedures covered.¹⁷⁸

During the state ratification conventions, Abraham Holmes of Massachusetts declared that "the mode of criminal process is to be pointed out by Congress, and they have no constitutional check on them, except that the trial is to be by a jury . . ."¹⁷⁹ Thomas Dawes, also of Massachusetts, explained that the Constitution did not provide for jury trials because "[t]he several states differ so widely in their modes of trial . . . [and thus] the [Constitutional] Convention have very wisely left it to the federal legislature to make such regulations as shall, as far as possible, accommodate the whole."¹⁸⁰ In Pennsylvania, James Wilson, one of the most influential Framers and, along with Ellsworth, one of five members of the Constitutional Convention's Committee of Detail,¹⁸¹ stated that "the power of making regulations with respect to the mode of trial may certainly be placed in the legislature" and noted that "the Convention [left] it to the future Congress to make regulations on this head."¹⁸² In South Carolina, Charles Pinckney stated, "[T]he laws which are to regulate trials must be

174. See *id.* at 514–35; see also CASTO, *EARLY REPUBLIC*, *supra* note 59, at 51.

175. See 1 GOEBEL, *supra* note 166, at 510–31 (describing Judiciary Committee's proposal to regulate federal procedure in detail and the Senate's rejection of it).

176. *Id.* at 510–11, 539–40 (arguing that the legislative history of the Process Act reveals a struggle between those who favored a consolidated national government and those who favored resting more control with the states). Ellsworth's initial effort to impose congressionally crafted uniform rules of procedure makes clear he believed Congress also had plenary legislative control over court procedure. That Ellsworth's original process provisions were eventually superseded by the Process Act was the result of a preference for requiring federal courts to follow state court procedures, not a belief that Congress was encroaching on a judicial function in regulating court procedure. See CASTO, *EARLY REPUBLIC*, *supra* note 59, at 51; 1 GOEBEL, *supra* note 166, at 537.

177. THE FEDERALIST NO. 83, at 496 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

178. Process Act of 1789, ch. 21, § 2, 1 Stat. 93.

179. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 84, at 110.

180. 2 *Id.* at 114.

181. Max Farrand has written that "Second to Madison and almost on a par with him was James Wilson. In some respects he was Madison's intellectual superior . . ." MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 197 (1913).

182. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 84, at 488.

made by the representatives of the people chosen as this house are, and as amenable as they are for every part of their conduct.”¹⁸³

B. The Supreme Court's Interpretation of the Process Act and Its Recognition of Congress's Power Over Federal Court Procedure

Joseph Story's *Commentaries on the Constitution* concludes:

[I]n all cases where the judicial power of the United States is to be exercised, it is for Congress alone to furnish the rules of proceeding, to direct the process, to declare the nature and effect of the process, and the mode in which the judgments consequent thereon shall be executed.¹⁸⁴

The Supreme Court, like Congress, recognized as much in its early days and found that the regulation of court procedure falls within the legislative function. The Court has noted that Congress's power over federal court procedure derives from both its power to constitute the lower federal courts¹⁸⁵ and also from the Necessary and Proper Clause, which provides that Congress has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”¹⁸⁶

The Process Act was considered by the Supreme Court in *Wayman v. Southard*.¹⁸⁷ In *Wayman*, a judgment debtor challenged Congress's authority to regulate the manner in which U.S. marshals executed federal court judgments in actions between private parties.¹⁸⁸ The debtor did not even contend that such regulation should be left to the judiciary,¹⁸⁹ and instead

183. 4 *id.* at 308.

184. 3 STORY, *supra* note 33, § 1758.

185. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”) (emphasis added).

186. U.S. CONST. art. I, § 8, cl. 18. The Necessary and Proper Clause is the broader of the two sources of authority, for it provides Congress with the power to regulate the procedures of the Supreme Court as well as the lower federal courts, whereas the Article III power to ordain and establish the lower federal courts grants Congress the power to impose procedures only on the lower federal courts. Congress could also assert authority over the procedures governing the Supreme Court's appellate procedures pursuant to Article III's Exceptions and Regulations Clause. U.S. CONST. art. III, § 2, cl. 2 (“In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

187. 23 U.S. (10 Wheat.) 1 (1825).

188. *Id.* at 2.

189. *Id.* at 21.

claimed that state legislatures retained complete authority over the execution process.¹⁹⁰ In *Wayman*, Chief Justice Marshall wrote that the phrase “forms and modes of proceedings in suits” as used in the Process Act “embraces the whole progress of the suit, and every transaction in it, from its commencement to its termination”¹⁹¹ and that “[t]he term is applicable to writs and executions, but it is also applicable to every step taken in a cause.”¹⁹² Earlier in the opinion, Chief Justice Marshall clearly indicated his belief in plenary legislative power over federal court procedure, citing the Necessary and Proper Clause.¹⁹³ Discussing how Congress could delegate procedural rulemaking authority to the judiciary if it so chose, Marshall wrote:

Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. Without going farther for examples, we will take that, the legality of which the counsel for the defendants admit. The 17th section of the Judiciary Act, and the 7th section of the additional act [a successor to the Judiciary Act of 1789 that granted federal courts more autonomy to formulate their own court rules], empower the Courts respectively to regulate their practice. It certainly will not be contended, that this might not be done by Congress. The Courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended, that these things might not be done by the legislature, without the intervention of the Courts; yet it is not alleged that the power may not be conferred on the judicial department.¹⁹⁴

In *Bank of the United States v. Halstead*,¹⁹⁵ the Court identified a second congressional power over court procedure. *Halstead* involved a dispute over the proper procedures to be followed by U.S. marshals in executing a judgment obtained in the Circuit Court for the District of Kentucky.¹⁹⁶ The Court stated, “It cannot certainly be contended . . . that Congress does not possess the uncontrolled power to legislate with respect both to the form and effect of executions issued upon judgments recovered in the Courts of the

190. *Id.*

191. *Id.* at 32.

192. *Id.* at 27.

193. *See id.* at 22.

194. *Id.* at 43.

195. 23 U.S. (10 Wheat.) 51 (1825).

196. *Id.* at 51–52.

United States.”¹⁹⁷ In addressing the question of Congress’s power over such matters, Justice Thompson, writing for the Court, asserted that “[t]he authority to carry into complete effect the judgments of the Courts, necessarily results, by implication, from the power to ordain and establish such Courts,” as well as from the express authority located in the Necessary and Proper Clause.¹⁹⁸

Quotes from some of the Supreme Court’s subsequent cases describing Congress’s power over federal court procedure are set out in Appendix B at the end of this article. The Process Act of 1789 constitutes the First Congress’s recognition that with the greater power to create the lower federal courts and the Supreme Court’s appellate jurisdiction comes the lesser power of directing what procedures those court will follow. The Supreme Court has agreed.¹⁹⁹

XI. THE CRIMES ACT OF 1790 AND THE REMOVAL OF FEDERAL JUDGES

The First Congress also passed a third statute affecting all judges in the federal judiciary. This one, the Crimes Act of 1790, defined the nation’s first federal crimes.²⁰⁰ One provision in the Act required that all federal judges, upon a conviction in court for bribery, “forever be disqualified to hold any office of honour, trust or profit under the United States.”²⁰¹ The

197. *Id.* at 53.

198. *Id.* at 53–54.

199. *See infra* Appendix B.

200. Crimes Act of 1790, ch. 9, 1 Stat. 112.

201. Crimes Act of 1790, ch. 9, § 21, 1 Stat. at 117. The constitutionality of the removal provision of the Crimes Act of 1790 has never been tested in court. In June 1991, Judge Robert F. Collins, U.S. District Judge for the Eastern District of Louisiana, was convicted on charges including accepting a bribe in violation of 18 U.S.C. § 201(b)(2). Elizabeth B. Bazan, Congressional Research Service, CRS Report for Congress 92-905A, *Disqualification of Federal Judges Convicted of Bribery – An Examination of the Act of April 30, 1790 and Related Issues* at 1 (Nov. 27, 1992) (citing *United States v. Collins*, 972 F.2d 1385, 1395 (5th Cir. 1992)). Section 201 is the most recent version of the Crimes Act of 1790. As reported by the Congressional Research Service:

The Collins case appears to have been the first instance where a federal judge was prosecuted under Section 201 or any of its precursors. . . . However, this case does not afford an opportunity for consideration of the constitutional sufficiency of the disqualification provision in Section 201 as applied to federal judges, because disqualification was not included in the sentence imposed upon Judge Collins after his conviction.

Id. at 4–5. More recently, the Judicial Conference of the United States has called for the impeachment of one federal district judge for actions involving bribery, but the prospects of the House’s acting on that call for impeachment remain unclear. *See* Richard Rainey, *Court Slams Porteous as Impeachment Move Stalls*, NEW ORLEANS TIMES-PICAYUNE (Sept. 11, 2008), available at http://www.nola.com/news/index.ssf/2008/09/porteous_do_not_publish.html.

Crimes Act of 1790 indicates that, beyond its plenary power over federal court jurisdiction and procedure, the First Congress believed it had the constitutional power to make conviction by a court an alternative means of removing a federal judge, outside the impeachment context, and it sheds light on the First Congress's understanding of its own powers to discipline federal judges. This is so despite the fact that "[i]t is a virtually unquestioned assumption among constitutional law cognoscenti that impeachment is the only means of removing a federal judge."²⁰²

A. Good Behavior, Impeachment, and the Constitutional Text

Again, it is worth beginning any inquiry into Congress's power to remove federal judges with the constitutional text.

Regarding federal judges and their service during good behavior, Article III, Section 1, of the Constitution provides that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour."²⁰³ Unlike the impeachment clauses,²⁰⁴ the good behavior provision appears in Article III and clearly applies only to judges.

Regarding the impeachment of all civil officers, which include not only federal judges but a large number of other federal officials of all sorts, Article II, Section 4, of the Constitution provides that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."²⁰⁵ The Impeachment Clause was included as part of the Constitution because if this power had not otherwise been made clear, the House and Senate would not have had the quasi-judicial and quasi-executive powers to indict, prosecute, and try officers in the other two branches via the impeachment process.²⁰⁶ Instead, the House and Senate would have been confined to exercising purely legislative powers.²⁰⁷

The Supreme Court has cited the federal anti-bribery statute that applies to federal judges without remarking on its constitutionality. *See De Veau v. Braisted*, 363 U.S. 144, 158–59 (1960) ("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas. Federal law has frequently and of old utilized this type of disqualification [A] large group of federal statutes disqualify persons 'from holding any office of honor, trust, or profit under the United States' because of their conviction of certain crimes, generally involving official misconduct." (citing the federal bribery statute among others)).

202. Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 74 (2006).

203. U.S. CONST. art. III, § 1.

204. U.S. CONST. art. I, § 3, cl. 7, art. II, § 4.

205. U.S. CONST. art. II, § 4.

206. *See* Prakash & Smith, *supra* note 202, at 81–82.

207. *Id.*

Article I, Section 3, Clause 7, of the Constitution also provides that:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.²⁰⁸

This latter provision simply provides that if someone is impeached by the House, but not convicted by the Senate, the fact of their prior impeachment shall not immunize them from any subsequent prosecution in court.²⁰⁹

Just as the federal judiciary itself was the subject of scant discussion at the Constitutional Convention, there was no discussion at all indicating that “judicial officers” were to be uniquely subject to removal solely through the mechanism of impeachment. That impeachment as a sole means of removal was not meant to apply uniquely to judges is indicated by the placement of the impeachment clauses outside Article III.²¹⁰ It is also indicated from the context of the debate regarding the impeachment clauses at the Constitutional Convention. Indeed, the insertion of the words “civil officers” into the impeachment clause during the Constitutional Convention was:

an unarticulated afterthought, tucked away in the last-minute insertion [of] “civil officers,” which itself was added without comment to the Executive Department Article II provision for impeachment of the President. . . .

The almost absent-minded inclusion of judges among “civil officers” undercuts the assumption that the Framers designed impeachment to enforce judicial “good behavior.”²¹¹

208. U.S. CONST. art. I, § 3, cl. 7.

209. See Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L. J. 643, 666–72 (1988).

210. See Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 898 (1930) (“The impeachment clauses are not found in the article dealing with the judicial branch, but in the articles dealing with the legislative and executive branches; and the power to impeach therein defined affects not judges in particular, but all civil officers alike. There is therefore no warrant whatever, either in the language of the impeachment clauses, or in their relation to other parts of the Constitution, for treating impeachment as an exclusive method of removing judges, as distinct from other federal officers.”).

211. RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 153–54 (1974) (citation omitted); see also Raoul Berger, *Impeachment for “High Crimes and Misdemeanors,”* 44 S. CAL. L.

B. *The Crimes Act of 1790*

Just as Oliver Ellsworth was the leading hand behind the Judiciary Act of 1789 and the Process Act of 1789, the Senate committee that drafted the 1790 Crimes Act was likely chaired by Oliver Ellsworth.²¹²

Section 21 of the Act of 1790, as ultimately enacted, provided in relevant part:

That if any person shall, directly or indirectly, give any sum or sums of money, or any other bribe, present, or reward, or any promise, contract, obligation or security, for the payment or delivery of any money, present or reward, or any other thing to obtain or procure the opinion, judgment or decree of any judge or judges of the United States, in any suit, controversy, matter or cause depending before him or them, and shall be thereof convicted, such person or persons so giving, promising, contracting or securing to be given, paid or delivered, any sum or sums of money, present, reward or other bribe as aforesaid, and the judge or judges who shall in any wise accept or receive the same, on conviction thereof shall be fined and imprisoned at the discretion of the court; and *shall forever be disqualified to hold any office of honour, trust or profit under the United States.*²¹³

As Raoul Berger has written, “the 1790 statute must be regarded as a construction that the impeachment clause does not constitute the ‘only’ means for the disqualification of judges.”²¹⁴ To be disqualified to “hold

REV. 395, 441 (1971) (“One thing is clear: in the impeachment debate the Convention was almost exclusively concerned with the President. The extent to which the President occupied the center of the stage may be gathered from the fact that the addition to the impeachment clause of ‘the Vice President and all Civil officers’ only took place on September 8th, shortly before the Convention adjourned.”) (citation omitted).

212. See 1 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA 108 (Jan. 26, 1790) (Washington, Gales & Seaton 1820) (recording composition of committee and that Ellsworth reported the bill to the Senate “on behalf of the committee”); see also Senate Calendar entry of Jan. 26, 1790, reprinted in 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789–MARCH 3, 1791: LEGISLATIVE HISTORIES, at 1741 (Charlene B. Bickford & Helen E. Veit eds., 1986) (“Committee to prepare appointed (Ellsworth, Johnson, Strong, Paterson, and Hawkins); Ellsworth presented a bill defining the crimes and offences that shall be cognizable under the authority of the United States, and their punishment, which was read.”).

213. Crimes Act of 1790, ch. 9, § 21, 1 Stat. 112, 117 (emphasis added).

214. BERGER, *supra* note 211, at 156 (“As with ‘disqualification’ so with ‘removal,’ for the two stand on a par in the impeachment provision.”). Article I, Section 3, Clause 7, of the Constitution provides that “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States,” indicating that removal and disqualification would be considered the standard dual punishment for serious misbehavior. U.S. CONST. art. I, § 3, cl. 7 (emphasis added).

any" office of honor, trust, or profit under the United States, is surely to be disqualified from holding one's current office.

The notion that impeachment is not the only means of removing a federal judge may be jarring to the modern ear, but in the 1930's, the American Bar Association supported provisions to allow federal judges to remove other federal judges, and such a proposal was apparently uncontroversial at the time.²¹⁵ More recently, in 1994, the Report of the National Commission on Judicial Discipline and Removal rejected the notion that removal upon conviction is a legitimate alternative to impeachment, although it stated it was a "most difficult question."²¹⁶ However, the report of the National Commission's conclusion was based on a false contradiction.²¹⁷ The Report stated:

The most difficult question in this connection is whether Congress may provide for removal as a criminal punishment. Congress has broad power to impose penalties for crimes. Indeed, a statute enacted by the First Congress in 1790 provided that a judge convicted of bribery would be disqualified from holding office. Arguably, this would effect removal if the judge were still serving. Moreover, neutral criminal laws do not threaten judicial independence. They are not adapted to retaliate against courts or judges for judicial decisions. Finally, there are strong policy considerations in favor of removal as a criminal sanction. Many crimes, especially criminal breaches of the public trust, warrant removal from public office as part of the punishment.

Nevertheless, the Commission concludes that Congress may not provide for removal as a criminal penalty. If removal may lawfully

215. In 1936, a bill was introduced in the House of Representatives, H.R. 2271, that would have created a "new tribunal for the trial and, upon conviction, for the removal from office of federal judges" when such judges fall short of "good behavior." Merrill E. Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 KAN. CITY L. REV. 3, 10, 12 (1938). The American Bar Association, in 1937, approved a resolution stating:

Resolved, That the Association approve H.R. 2271 providing a method for the removal of district judges, provided it be amended so as to provide for a court of seven circuit judges, and to allow an appeal in all cases on questions of law [and] fact where there is dissent by any member of the court.

Id. at 12 (quoting resolution adopted by the American Bar Association in the meeting of the Assembly of the Association in Kansas City on Sept. 29, 1937). Debate regarding the resolution occupied less than twelve minutes. *See id.* at 13.

216. *Report of the National Commission on Judicial Discipline and Removal*, reprinted in 152 F.R.D. 265, 288 (1993).

217. *See id.*

follow on conviction for a federal judge, then it may do so for the Vice President of the United States or perhaps even the President.²¹⁸

Such a conclusion, however, points to a false contradiction because only federal judges, and not officials of the executive branch, serve during “good behavior,” making federal judges uniquely subject to the enforcement of “good behavior” discipline by the judicial branch. Further, while there would be serious separation of powers concerns with a process by which executive branch officials were removed from office upon conviction by another branch, such concerns do not arise with processes that provide for the removal of federal judges by members of their own judicial branch.²¹⁹

C. *Early Treatises on Good Behavior*

A review of legal treatises in use during the Founding Period confirm that “good behavior” tenure was understood to be terminable upon conviction in court.

As Raoul Berger has written, “A grant ‘during good behavior’ is simply an estate on a condition subsequent, which is defeated or forfeited by nonperformance of the condition.”²²⁰ The justification for removing officers

218. *Id.*

219. On this point, a discussion in the First Congress between Vice President John Adams and Senator Oliver Ellsworth is instructive. Vice President Adams and Senator Ellsworth addressed the question of how impeachment relates to the criminal prosecution of a sitting President during one sidebar in a congressional coatroom. 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 168 (Kenneth R. Bowling & Helen E. Veit eds., 1988). When it came to the President, they told a colleague in the first Senate, “You could only impeach him . . . and no other process [w]hatever lay against him.” *Id.* A Senate colleague asked whether this meant that a President could “commit[] [m]urder” and remain free until impeachment. *Id.* The answer from Ellsworth was: “[w]hen he is no longer President, [y]ou can indict him.” *Id.* To support their view that this correctly interpreted the impeachment clause, the two pointed out that otherwise every judge and justice in the country could “exercise any [a]uthority over [the President] and [s]top the [w]hole [m]achine of Government.” *Id.* Thomas Jefferson agreed, concluding that if it were otherwise, the executive branch would be subordinate to the judicial branch. Letter from Thomas Jefferson to George Hay (June 20, 1807), in 10 The Works of Thomas Jefferson 404 (Paul L. Ford ed., 1905), quoted in *Nixon v. Fitzgerald*, 457 U.S. 731, 751 n.31 (1982). In 1807, Jefferson wrote “would the executive be independent of the judiciary . . . if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?” *Id.* However, such statements do not contradict the notion that federal judges can be removed by means other than impeachment, as an entire branch of the federal government does not rely on the service of any single judge. Also, judges could not generally be indicted when their judgeships ended if they served for life and were only subject to impeachment. In addition, the removal of federal judges by other federal judges would not violate the separation of powers because the process would occur within the same branch of government. See Robert R. Davis, Jr., *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV. 448, 461 (1966-67) (“Removal by judicial action is not inconsistent with the separation of powers concept, for the proceedings would remain entirely within the judiciary.”).

220. BERGER, *supra* note 211, at 139.

due to abuse of the public trust, including bribery specifically, was derived from the English idea of an office as a grant of an estate upon an “implied condition” of good behavior.²²¹ In his famous *Commentaries*, in the chapter entitled “Of Estates upon Condition,” Blackstone wrote: “As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition that the grantee shall duly execute his office, on breach of which condition it is lawful for the grantor . . . to oust him”²²² According to Blackstone, then, removal from office need not even be specifically codified as a punishment for misbehavior during the course of a grant of tenure during “good behavior,” as removal from office for misbehavior was inherent in the grant. In the very next section of his treatise, Blackstone specifically uses the example of taking a bribe to illustrate the forfeit of a grant of “good behavior” tenure by “misuse,” writing, “For an office, either public or private, may be forfeited by *misuser* or *nonuser*, both of which are breaches of this implied condition. . . . By *misuser*, or abuse; as if a judge takes a bribe”²²³ Blackstone also made clear that removal from office could follow from either impeachment or a separate court process, writing that a corruption offense “when prosecuted, *either by impeachment in parliament, or by information in the court of king’s bench* . . . it is sure to be severely punished with forfeiture of their offices”²²⁴

Oliver Ellsworth was certainly familiar with Blackstone’s writings. Senator William Maclay of Pennsylvania wrote that Ellsworth “brought forward Judge Blackstone, and read much out of him” during the debates in the Senate on the bill that became the Judiciary Act of 1789.²²⁵ One of Ellsworth’s biographers also noted the existence of a copy of the first American edition of Blackstone’s *Commentaries* with Ellsworth’s name and the year 1774 inscribed on the flyleaf.²²⁶

The same concepts described by Blackstone are contained in the works of other English authorities that were standard reference works of the sort

221. *Id.* at 130–31.

222. 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 915, §204 (William Carey Jones ed., 1915).

223. *Id.* § 205. Blackstone also wrote that the English Parliament had provided that a judge convicted of receiving a bribe would “be discharged from the king’s service for ever.” 4 *id.* at 140, § 17.

224. *Id.* at 140–41, § 21 (emphasis added).

225. William Maclay Diary Entry (June 29, 1789), in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 92 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

226. See BROWN, *supra* note 16, at 22.

cited in early American cases. In Coke's *Commentary upon Littleton*, Coke wrote that "for offices in any wise touching the administration or execution of justice," any holders of such offices who:

bargaine or sell any of the said offices . . . or take any money or profit, or any promise, covenant, bond, or assurance, to have any money or reward for the same . . . shall not only forfeit his estate but also . . . be adjudged a disabled person to have or enjoy the same office or offices.²²⁷

John Adams quoted Coke for the proposition, also articulated by Blackstone, that removal of an estate for bad behavior would be implied, even if not explicitly stated, in the grant of an office "for life."²²⁸ Adams wrote that if an:

office is granted to him *quamdiu se bene gesserit*, wherein he hath a more fixed estate (it being an estate for life) . . . *quamdiu se bene gesserit* must be intended in matters concerning his office, and is no more than the law would have *implied* if the office had been granted for life.²²⁹

And Jeremy Bentham, writing at the very time of the ratification debates on the American Constitution in 1787, also described a grant of "good behaviour" tenure in England as being subject to forfeit following legal

227. 2 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND*, L. 3, C. 5, § 378 (Philadelphia, Robert Small 1853). In his treatise, William Hawkins also wrote:

I take it to be agreed, that in the grant of every office whatsoever, there is this condition implied by common reason, that the grantee ought to execute it diligently and faithfully; for since every office is instituted, not for the sake of the officer, but for the good of some other, nothing can be more just than that he who either neglects or refuses to answer the end for which this office was ordained, should give way to others, who are both able and willing to take care of it.

1 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN*, ch. 27, § 1, at 412 (London, S. Sweet 1824). Bacon's *Abridgement* further explained:

If an Office be granted to a Man to have and enjoy so long as he shall behave himself well in it; the Grantee hath an Estate of Freehold in the Office; for since nothing but his Misbehavior can determine his Interest, no man can prefix a shorter Time than his Life; since it must be his own Act (which the Law does not presume to foresee) which only can make his Estate of shorter Continuance than his Life . . .

3 MATTHEW BACON, *A NEW ABRIDGEMENT OF THE LAW*, "OFFICES AND OFFICERS" 733 (London 4th ed. 1778).

228. 3 *THE WORKS OF JOHN ADAMS* 524–25 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851).

229. *Id.* (quoting 4 COKE, *supra* note 227, at 117) (emphasis added); see also 4 COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 117 (Lawbook Exchange 2002). "*Quamdiu se bene gesserint*" means "As long as they shall conduct themselves properly. The term refers to a holding of an office [that] could continue until death or improper conduct." BLACK'S LAW DICTIONARY 1276 (8th ed. 2004).

process.²³⁰ He wrote of government officers that “unless specific instances of *misbehavior*, flagrant enough to render his removal expedient, be *proved on him in a legal way*, he shall have it for his *life*.”²³¹

D. *The Views of the Founders*

Support for the proposition that judges may be removed from office by conviction in court as an alternative to impeachment is also supplied by several statements made by prominent members of the Constitutional Convention.

John Adams understood criminal prosecutions to be the appropriate mechanism to enforce the good behavior of judges. In 1773, Adams, in the course of a debate regarding the status of Massachusetts judges, stated his understanding that if Massachusetts judges served at the pleasure of the King, a judge could be removed “without a trial and judgment for ill behavior” and “without a hearing and judgment that he had misbehaved,”²³² but that if Massachusetts judges were appointed during good behavior, such judges could be removed only upon a “hearing and trial, and an opportunity to defend himself before a fuller board, knowing his accuser and the accusation.”²³³

Evidence that good behavior could be enforced through criminal prosecution is also found in a speech made in the Continental Congress. While serving as Secretary of the Committee on Foreign Affairs, Thomas Paine was accused of having revealed secrets regarding negotiations with the French, and Congress had to decide whether to remove Paine from his office.²³⁴ Gouverneur Morris, a delegate from Pennsylvania, thought this was unnecessary to allow Paine to plead his case in court because Paine did not hold his office during good behavior.²³⁵ Morris argued:

Gentlemen exclaim Do not deprive Mr. Payne of his Office without giving him a Copy of the Charge! Do not punish a Citizen unheard! *I ask on what Tenure he holds that Office? Is it during good*

230. JEREMY BENTHAM, *Letter IX*, reprinted in JEREMY BENTHAM: THE PANOPTICON WRITINGS 51 (Miran Bozovic ed., Verso 1995).

231. *Id.* (all but last emphasis added).

232. 3 THE WORKS OF JOHN ADAMS, *supra* note 228, at 556, 559.

233. *Id.* at 571.

234. See Prakash & Smith, *supra* note 202, at 106.

235. Gouverneur Morris, Address to Congress (Jan. 7, 1779), in 11 LETTERS OF DELEGATES TO CONGRESS 426 (Paul H. Smith ed., 1985).

*Behaviour? If it be he must be convicted of Malconduct before he can be removed. But we are not the proper Court to take Cognizance of such Causes. We have no criminal Jurisdiction. Clearly then he ought not to be heard before us. But he does not hold his Office during good Behavior it is during Pleasure that he holds it.*²³⁶

Morris thereby confirmed his understanding that good behavior tenure required a trial before removal. Like John Adams, he understood that good behavior tenure could be terminated following a judicial judgment of misbehavior.

This understanding, presumably obtained in the First Congress, followed the understanding expressed in early legal treatises discussed in the previous section.²³⁷ Although in 1802 Representative Rutledge of South Carolina claimed to be stating the view of James Madison that “[t]he Judges are to be removed only on impeachment, and conviction before Congress,”²³⁸ the congressional record notes Madison as stating in a much more noncommittal manner that he “did not conceive it was a proper construction of the constitution to say[] that there was no other mode of removing from office than that by impeachment,” and regarding federal judges specifically, he stated that their removal by impeachment alone only “*might* be the case.”²³⁹ Further, Madison also indicated he believed impeachment was a “supplemental”—not an exclusive—means of removing misbehaving officers, stating that “the declaration in the constitution was intended as a *supplemental* security for the good behavior of the public officers.”²⁴⁰

Alexander Hamilton stated that federal judges:

are liable to be impeached for malconduct by the House of Representatives and tried by the Senate; and, if convicted, may be dismissed from office and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one

236. *Id.* (emphasis added).

237. Raoul Berger has stated that “[w]hen the Framers employed ‘good behavior,’ a common law term of ascertainable meaning, with no indication that they were employing it in a new and different sense, it might be presumed that they implicitly adopted the judicial enforcement machinery that traditionally went with it.” BERGER, *supra* note 211, at 136 (citing Madison as stating “where a technical word was used all the incidents belonging to it necessarily attended it” in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 84, at 531 (June 18, 1788)).

238. 11 ANNALS OF CONG. 738 (Joseph Gales ed., 1834).

239. 1 ABRIDGEMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856, at 87–88 (D. Appleton & Co. 1857) (May 19, 1789) (emphasis added).

240. *Id.* at 86 (emphasis added).

which we find in our own Constitution in respect to our own judges.²⁴¹

However, as has been pointed out by Saikrishna Prakash and Steven D. Smith, “[t]oo much has been made of this ambiguous statement[.]”²⁴² as:

many have erroneously read the second clause as a reference to the Federal Constitution. Yet Hamilton could not have been referring to the proposed Constitution when he used the phrases “our own Constitution” and “our own judges” primarily because the proposed Constitution was no one’s constitution [yet] and because there were no federal judges [at the time]. In fact, Hamilton was referring to the New York Constitution and not the proposed Federal Constitution. We must never forget that Hamilton was writing “To the People of the State of New York” and often compared the two constitutions for the benefit of New Yorkers.²⁴³

Second, Hamilton himself recognized at least one circumstance in which judges could be removed by a means other than impeachment, namely the circumstances in which they had gone insane.²⁴⁴ Therefore even Hamilton saw that at least one exception from the necessity of removal by impeachment existed “without any formal or express provision” at all in the Constitution.²⁴⁵

Thomas Jefferson famously bemoaned the lack of an elective check on the federal judiciary.²⁴⁶ Even so, he recognized that the federal judiciary

241. THE FEDERALIST NO. 79, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

242. Prakash & Smith, *supra* note 202, at 119.

243. Prakash & Smith, *supra* note 202, at 119 n.178.

244. See THE FEDERALIST NO. 79, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that “insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification” from continuing to be a federal judge).

245. *Id.* Of course, Hamilton’s views regarding the exact meaning of the Constitution regarding its tenure in office provisions have been shown to be in error in other contexts. In Federalist No. 77, he wrote that the Senate’s advice and consent power extended not only to the confirmation of such officials, but also that “consent of that body would be necessary to displace [an executive official from office] as well as to appoint.” THE FEDERALIST NO. 77, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 196). Subsequent debates, of course, and the Supreme Court’s decision in *Myers v. United States*, 272 U.S. 52 (1926), established that executive officials could be removed from office by the President alone.

246. He urged that “[w]hen the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity,” adding that “[t]he exemption of the judges from that is quite dangerous enough. I know of no safe depository of the ultimate powers of the society but the people themselves.” Letter from Thomas Jefferson to William Charles Jarvis (Sept.

was removable by members of the judicial branch itself, writing that judges “are irremovable, *but by their own body*, for any depravities of conduct,”²⁴⁷ clearly indicating he believed judges could be removed by the judicial branch.

Some Members of the First Congress did express the notion that impeachment is the sole means of removing federal judges,²⁴⁸ but they did so in a context in which the removal of judges was not specifically at issue. However, as Raoul Berger has written, “[w]hat the First Congress *did* when it had to deal with ‘disqualification’ of judges [that is, the First Congress’s enactment of the Crimes Act of 1790] thus speaks against reliance upon some earlier utterances by a few of its members when the removal of judges was not involved.”²⁴⁹ Indeed, when one Member of Congress in 1802 did explicitly describe the removal powers of Congress in a context specifically regarding its power over federal judges, the conclusion was plain. Congressman David Stone, of North Carolina, said at length:

[I]t being declared, by the first section of the third article of the Constitution, that the judges both of the supreme and inferior courts shall hold their office during good behaviour. They doubtless shall . . . be removed from office by impeachment and conviction; but it does not follow that they might not be removed by other means. . . . [A]lthough a judge, guilty of high crimes and misdemeanors, is always guilty of misbehaviour in office, yet that of the various species of misbehaviour in office, which may render it exceedingly improper that a judge should continue in office, many of them are neither treason, nor bribery, nor can they properly be dignified by the appellation of high crimes and misdemeanors

To what source, then, shall we resort for a knowledge of what constitutes this thing, called misbehaviour in office? The Constitution, surely, did not intend that a circumstance so important as the tenure by which the judges hold their offices, should be incapable of being ascertained. Their misbehaviour certainly is not an impeachable offense; still it is the ground upon which the judges are to be removed from office. The process of impeachment, therefore, cannot be the only one by which the judges may be

28, 1820), in 12 THE WORKS OF THOMAS JEFFERSON 163 (Paul Leicester Ford ed., 1898).

247. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in HENRY S. RANDALL, 3 THE LIFE OF THOMAS JEFFERSON 648 (1858) (emphasis added).

248. See 1 ANNALS OF CONG. 579 (Joseph Gales ed., 1834) (“The judges are appointed by the President, by and with the advice and consent of the Senate; but they are only removable by impeachment.”) (statement of Rep. Baldwin); *id.* at. 828 (“The judges are to hold their commissions during good behavior, and after they are appointed, they are only removable by impeachment”) (statement of Mr. Smith of South Carolina).

249. BERGER, *supra* note 211, at 157.

removed from office, under, and according to the Constitution. I take it, therefore, to be a thing undeniable, that there resides somewhere in the Government a power to declare what shall amount to misbehaviour in office, by the judges, and to remove them from office for the same, without impeachment.²⁵⁰

E. The State Laws Consulted by the Drafters of the Crimes Act of 1790

The Senate committee charged with drafting the Crimes Act of 1790 made a request to see the state laws of Massachusetts, New Jersey, Pennsylvania, Virginia, and South Carolina, when they began the drafting process.²⁵¹ Laws in each of those states included provisions that prohibited judges who engaged in bribery from holding office.

The Pennsylvania Constitution of 1776 provided that “[a]ll courts shall be open And if any officer shall take greater or other fees than the law allows him, either directly or indirectly, it shall ever after disqualify him from holding any office in this state.”²⁵² The terms “holding,” as used in the Pennsylvania Constitution, and “hold,” as used in the Crimes Act of 1790,²⁵³ would seem by their plain meaning to apply to offices contemporaneously held as well as future offices.²⁵⁴

The Massachusetts Constitution similarly prohibited any person convicted of bribery from being allowed to “hold” any office of public trust.²⁵⁵ And a Massachusetts criminal statute, entitled “An Act to Prevent

250. 11 ANNALS OF CONG. 72–73 (Joseph Gales ed., 1834) (remarks made during the course of House debate on the repeal of the Act for a New Organization of the Judiciary System).

251. See Letter from Otis to Roger Alden (July 1, 1789), in 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789–MARCH 3, 1791: LEGISLATIVE HISTORIES, at 1720 (Charlene B. Bickford & Helen E. Veit eds., 1986).

252. 2 BENJAMIN PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 1546 (2d ed. 1972).

253. Crimes Act of 1790, ch. 9, § 21, 1 Stat. 112, 117 (“shall forever be disqualified to hold any office of honour, trust or profit under the United States”).

254. Johnson’s Dictionary, first published in 1755 and one of the most influential dictionaries of the English language, defined “hold” as “to keep.” JOHNSON’S DICTIONARY 165 (Charles J. Hendee ed., 1836).

255. See 1 POORE, *supra* note 252, at 972 (containing language of the Massachusetts Constitution of 1780, art. II, cl. 5, as follows: “And no person shall ever be admitted to hold a seat in the legislature, or any office of trust or importance under the government of this commonwealth, who shall in the due course of law have been convicted of bribery or corruption in obtaining an election or appointment.”). Johnson’s Dictionary defined “Admit” to include “to allow . . . a position.” JOHNSON’S DICTIONARY 8 (Charles J. Hendee ed., 1836). If one uses the definitions of “admit” and “hold,” as defined by Johnson’s Dictionary, the relevant phrase in the Massachusetts Constitution

Bribery and Corruption,” provided that anyone who received a bribe in any office of trust “shall, on the conviction, be disabled from holding the [office of trust], and be forever after [such conviction] incapable of sustaining any office or place of trust, within this Province.”²⁵⁶

South Carolina’s anti-bribery statute also provided that “[f]or the avoiding of corruption which may hereafter happen to be in the officers and ministers of those courts, places, or rooms wherein there is requisite to be had the true administration of justice or services of trust,”²⁵⁷ anyone who was found “to receive, have or take any money, fee, reward or any other profit directly or indirectly . . . shall . . . loose and forfeit all his . . . right, interest and estate which such person . . . shall then have of, in, or to . . . any of the said office or offices.”²⁵⁸

A Virginia statute enacted in 1792, not too long after the enactment of the Crimes Act of 1790, prohibited bribery and required that a convicted judge “shall be amerced and imprisoned at the direction of a jury, and shall be discharged from his office forever.”²⁵⁹

Beyond the states whose laws were requested by the drafters of the Crimes Act of 1790, other states at the time provided for the removal of judges from office upon conviction in court for bribery. The Maryland Constitution of November 11, 1776 provided:

[t]hat if any . . . Judge . . . shall receive, directly or indirectly, at any time, the profits, or any part of the profits of any office, held by any other person, during his acting in the office to which he is appointed; his . . . appointment . . . (on conviction in a court of law by oath of two credible witnesses) shall be void; and he shall suffer the punishment for wilful and corrupt perjury, or be banished this State forever, or disqualified forever from holding any office or place of trust or profit, as the court may adjudge.²⁶⁰

would read, “[N]o person shall ever be allowed to keep . . . any office of trust or importance under the government of this commonwealth, who shall in the due course of law have been convicted of bribery or corruption”

256. 3 PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS FROM THE ESTABLISHMENT OF ITS CONSTITUTION IN THE YEAR 1780 TO THE END OF THE YEAR 1800, at 213 (misnumbered as 113) (I. Thomas & E. T. Andrews eds., 1801).

257. THE PUBLIC LAWS OF THE STATE OF SOUTH CAROLINA FROM ITS FIRST ESTABLISHMENT AS A BRITISH PROVINCE DOWN TO THE YEAR 1790, INCLUSIVE, at 146 (John F. Grimkae ed., Philadelphia, R. Aitken 1790).

258. *Id.*

259. ABRIDGMENT OF THE PUBLIC PERMANENT LAWS OF VIRGINIA 22 (Edmund Randolph ed. Richmond, Augustine Davis 1796). This relatively contemporaneous statute may indicate a commonality of thought on this issue that existed at the time.

260. MD. CONST. of 1776, art. LIII. As one historian has written, “Maryland constitution established good behavior as the duration of judicial tenure, but it left judges far from independent.

The Maryland Constitution also granted good behavior tenure to some officers, including judges, that would be enforced in court, by providing that "all Judges . . . shall hold their commissions during good behaviour, removable only for misbehaviour, on conviction in a Court of law."²⁶¹ Delaware's Constitution also granted officers good behavior tenure and provided that "all officers shall be removed on conviction of misbehaviour at common law or on impeachment, or upon the address of the General Assembly."²⁶² Under that clause of the Delaware Constitution, good behavior tenure was terminable upon a finding of misbehavior in court, and impeachment was simply an alternative means of removal.²⁶³ And the New Hampshire Constitution of June 2, 1784 provided that "[n]o person shall ever be admitted to hold . . . any office of trust or importance under this government, who in the due course of law, has been convicted of bribery or corruption, in obtaining an election or appointment."²⁶⁴

F. Analogous Provisions in Other Laws Passed by the First Congress

At least three statutes passed by the First Congress, other than the Crimes Act of 1790, contained clauses disqualifying federal officers engaging in improper behavior. They included an Act to Regulate the Collection of the Duties, enacted on July 31, 1789;²⁶⁵ an Act to Establish the Treasury Department, enacted on September 2, 1789;²⁶⁶ and an Act Laying Duties on Distilled Spirits, enacted on March 3, 1791.²⁶⁷ Taken in context, these enactments of the First Congress also indicate that the Crimes Act of 1790 was intended to provide for the removal of federal judges from office upon conviction of bribery in court.

The chancellor and common-law judges could be removed for misbehavior [by] conviction in a court of law" See Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 142 (1969).

261. MD. CONST. of 1776, art. XL.

262. DEL. CONST. of 1776, art. XXIII.

263. See *id.* ("The president . . . and all others offending against the State, either by maladministration, corruption, or other means, by which the safety of the Commonwealth may be endangered, within eighteen months after the offence committed, shall be impeachable by the house of assembly before the legislative council . . .").

264. THURSTON GREENE, *THE LANGUAGE OF THE CONSTITUTION: A SOURCEBOOK AND GUIDE TO THE IDEAS, TERMS, AND VOCABULARY USED BY THE FRAMERS OF THE UNITED STATES CONSTITUTION* 108 (1991) (emphasis omitted) (quoting New Hampshire Constitution of June 2, 1784).

265. Act of July 31, 1789, ch. 5, 1 Stat. 29.

266. Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.

267. Act of Mar. 3, 1791, ch. 15, 1 Stat. 199.

1. Act of July 31, 1789 (Act to Regulate the Collection of Duties)

James Madison introduced the Act to Regulate the Collection of Duties.²⁶⁸ The Act created various customs officials, and section 35 of the Act imposed a penalty upon “any officer of the customs” who received “any bribe . . . or recompense for conniving, or shall connive at a false entry of any ship or vessel, or of any goods, wares or merchandise.”²⁶⁹ Upon conviction under the Act, the officer would incur a fine of two hundred to two thousand dollars for each offense and would be “forever disabled from holding any office of trust or profit under the United States.”²⁷⁰ Conviction under the Act, like the Crimes Act of 1790, disabled one from “holding any” covered office, which would, again, include one’s current office.²⁷¹ Although the statute did not explicitly provide for the removal of the convicted customs officers, disqualification without removal would have made little sense in the case of a corrupt customs official, just as it would have made little sense in the case of a corrupt federal judge because it would have allowed an official who breached the public trust to remain a federal official and continue to be charged with raising revenue, or making rulings, under the authority of the state. Further, section 35 of the Act to Regulate the Collection of Duties did not provide for imprisonment as a penalty, so a convicted officer would not have been *de facto* removed from office unless removal were part of the punishment provided for by statute.²⁷² Consequently, it is likely it was understood by the Act’s drafters that a federal official convicted under the Act would be immediately removed from office.

2. Act of September 2, 1789 (Act to Establish the Treasury Department)

The House of Representatives next took up a bill to create the Department of the Treasury.²⁷³ That prompted a great debate on May 19, 1789, among members of the House regarding the constitutionality of legislation granting the President the power to remove executive officers.²⁷⁴ The House resolved the debate in favor of the President’s power to remove the officers, with Madison arguing that authorizing the President to remove

268. Act of July 31, 1789, ch. 5, 1 Stat. 29.

269. Act of July 31, 1789, ch. 5, § 35, 1 Stat. at 46.

270. *Id.*

271. *Id.*

272. *Id.*

273. 1 ANNALS OF CONG. 383–84 (Joseph Gales ed., 1834).

274. *See id.* at 384–412, 473–608, 614–31, 635–39.

lower executive officers would beneficially increase the President's own accountability for the actions of those officers.²⁷⁵

The Act of September 2, 1789, provided for creation of "the following officers, namely: a Secretary of the Treasury, to be deemed head of the department; a Comptroller, an Auditor, a Treasurer, a Register."²⁷⁶ All of these officers were appointed by President George Washington and confirmed by the Senate.²⁷⁷ Consequently, as officers of the United States, the people serving in each of those positions were subject to potential impeachment. Yet the Act also forbade these officers from participating in a wide range of financial self-dealing, including bribery. Section 8 of the Act provided:

And be it further enacted, That no person appointed to any office instituted by this act, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce, or be owner in whole or in part of any sea-vessel, or purchase by himself, or another in trust for him, any public lands or other public property, or be concerned in the purchase or disposal of any public securities of any State, or of the United States, or take or apply to his own use, any emolument or gain for negotiating or transacting any business in the said department, other than what shall be allowed by law²⁷⁸

Classifying the crime as a "high misdemeanor" to be prosecuted in the federal courts, the Act stipulated not only the punishment of a fine, but also that the offender "shall upon conviction be removed from office, and forever

275. See *id.* at 387 (Madison said, "I think it absolutely necessary that the President should have the power of removing from office; it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses. On the constitutionality of the declaration I have no manner of doubt."). The same argument, of course, could support the removal of federal judges by other judges, as such removal mechanisms would "make [federal judges], in a peculiar manner, responsible for [other federal judges'] conduct, and subject [them] to impeachment . . . if [they] suffer[federal judges] to perpetrate with impunity high crimes or misdemeanors against the United States, or neglect[] to superintend their conduct, so as to check their excesses." *Id.*

276. Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65.

277. On September 11, 1789, President Washington submitted the nominations to the positions of Secretary of the Treasury, Comptroller, Treasurer, Auditor, and Register. See U.S. Congress, Senate Exec. Journal 1st Cong., 1st sess. (Sept. 11, 1789) at 25. The first three of these nominations were confirmed by the Senate on the same day, and the other two were confirmed the following day. See *id.* at 25–26.

278. Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. at 67.

thereafter incapable of holding any office under the United States.”²⁷⁹ The “conviction” referred to was clearly a conviction in court, as the Act further provided for an additional incentive for people other than prosecutors to come forward with information leading to a “prosecution and conviction.” To that end, the Act provided “[t]hat if any other person than a public prosecutor shall give information of any such offence, upon which a prosecution and conviction shall be had, one half the aforesaid penalty of three thousand dollars, when recovered, shall be for the use of the person giving such information.”²⁸⁰ Consequently, the Act made federal officials removable by criminal conviction in court as well as by impeachment and by removal by the President.

The Act to establish the Treasury Department was the first statute to explicitly include “removal” in addition to disqualification as the punishment for certain acts of official misbehavior. The Crimes Act of 1790 and the Act of July 31, 1789 employed the broader term “hold[ing] any office,” which encompasses both current and future office.²⁸¹ The terms used by the Act of September 2, 1789, also applied to both current and future offices, but it did so by applying one term for current offices, and another for future offices, as in “removed from [current] office,” and “forever thereafter incapable of holding any [future] office.”²⁸²

Why the drafters made explicit in the Act of September 2, 1789 what was implicit in the Act of July 31, 1789 can be explained by the temporal fact that the former Act to establish the Treasury Department was drafted immediately after the comprehensive House debate on the removal powers of the President. When the Act of September 2, 1789, was drafted, the concept of removal and the President’s removal powers were at the front of the drafters’ minds, and the concept of removal likely would have been specifically included for clarity’s sake. Indeed, section 8, providing for removal of officers following criminal prosecution, immediately follows the clause explicitly acknowledging the President’s power to remove Treasury officers.²⁸³ If the Act to establish the Treasury Department had not explicitly provided for removal upon conviction in court, it may have been feared that the statute could be construed to allow removal by the President (which the

279. *Id.*

280. *Id.*

281. See Crimes Act of 1790, ch. 9, § 21, 1 Stat. 112, 117; Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46. .

282. Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. at 67.

283. See *id.* (“And be it further enacted, That whenever the Secretary shall be removed from office by the President of the United States, or in any other case of vacancy in the office of Secretary, the Assistant shall, during the vacancy, have the charge and custody of the records, books, and papers appertaining to the said office.”).

Act made explicit, following the extensive House debate on the subject), and by impeachment, but not by courts as well.

In addition, it is worth noting that, unlike the provision in the Act authorizing the removal of federal officers by the President, the provision for the removal of officers following criminal conviction resulted in no debate whatsoever, providing good reason to believe Congress considered the removal of federal officers following criminal conviction to be a legitimate alternative to impeachment.²⁸⁴

3. Act of March 3, 1791 (Act Laying Duties on Distilled Spirits)

Congress also enacted the Act of March 3, 1791,²⁸⁵ which contained in section 49 penalties for revenue officers or supervisors who entered "into any collusion with any person or persons for violating or evading any of the provisions of this act, or the duties hereby imposed," or who "embezzle[d] the public money or otherwise [were] guilty of fraud in his office."²⁸⁶ If convicted of these offenses, section 49 provided that such supervisor or other officer "shall forfeit his office, and shall be disqualified for holding

284. This Act and the Constitution appear to recognize the possibility of the removal of federal officers by impeachment, removal by the President, or conviction in court under the Act's section 8. Oliver Ellsworth, during the debates during the First Congress regarding whether the President alone could remove executive officials, argued that because removal was an executive power, only the President could remove them, making the following analogy:

I buy a Square Acre of land. I buy the Trees. Waters & every thing belonging to it. [T]he executive power belongs to the president. [T]he removing of officers is a Tree on this Acre. [T]he power of removing is therefore, his, it is in him, it is no where else. [T]hus we are under the necessity of ascertaining by implication where the power is . . .

Diary Entry of William Maclay (July 15, 1789), in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 3, 113 (Kenneth R. Bowling & Helen E. Veit eds., 1988). A slightly different account of the same statement in the Senate comes from Senator William Patterson, who described Ellsworth's comments as follows:

To turn a man out of office is an exercise neither of legislative nor of judicial power; it is like a tree growing upon land that has been granted [to the President]. The advice of the senate does not make the appointment; the president appoints: there are certain restrictions in certain cases, but the restriction is as to the appointment and not as to the removal.

2 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 192 (1882). Both of these statements are consistent with the view that a federal judge could also be removed through a process, such as conviction in a federal court, implemented by the judicial branch itself, as both the removed judge and his removers would occupy the same "land," namely that occupied by the judicial branch.

285. Act of Mar. 3, 1791, ch. 15, 1 Stat. 199.

286. *Id.* § 49, 1 Stat. at 210.

any other office under the United States.”²⁸⁷ This provision also separately provides for the officer’s removal from current office. It also clearly provides that the offices concerned were to be filled by those appointed by the President, with the advice and consent of the Senate under section 4 of the Act,²⁸⁸ meaning such officers would also be subject to impeachment. Consequently, this Act also indicates impeachment and removal by the President could not have been understood by the drafters of the Act of March 3, 1791, as the sole means of removing federal officers from office.²⁸⁹

G. Congress’s Allowing Court Removal of a Territorial Judge in 1796

There is also strong evidence that Congress, in 1796, must have thought that the courts’ enforcement of good behavior tenure could be an alternative to impeachment, based on its experience involving territorial judge George Turner.

The Northwest Ordinance granted territorial judges tenure during good behavior.²⁹⁰ When the Constitution was ratified, Congress made territorial judges “civil officers of the United States,” subjecting them also to potential impeachment under the Constitution. Territorial judges were indeed subject to impeachment²⁹¹ as they, like federal judges, were “civil officers”

287. *Id.*

288. *See id.* § 4, 1 Stat. at 200 (“Be it further enacted That the President be authorized to appoint, with the advice and consent of the Senate, a supervisor to each district, and as many inspectors to each survey therein as he shall judge necessary, placing the latter under the direction of the former.”).

289. Interestingly, another Act passed by the First Congress authorized the removal of mint officers in the executive branch for nothing more than negligence, upon the certification of other federal officials that included those outside the executive branch. Under the Act of April 2, 1792, officers of the mint were to strike coins that met certain specified standards. *See* Act of Apr. 2, 1792, ch. 16, §§ 10–13, 1 Stat. 246, 248–49. Federal officials, including the Chief Justice, the Secretaries of Treasury and State, and the Attorney General, were also required to periodically determine whether randomly selected coins had met the minimum statutory requirements. *See id.* § 18, 1 Stat. at 250. If these officials found that the coins were of inferior quality, the Act provided that “the officer or officers of the said mint whom it may concern shall be held excusable; but if any greater inferiority shall appear, it shall be certified to the President of the United States, and the said officer or officers shall be deemed disqualified to hold their respective offices.” *Id.*

290. *See* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.a.

291. *See* House Rules Manual, 109th Congress (108th Cong., 2d Sess.) (House Document No. 108-241) (“Proceedings for the impeachment of territorial judges have been taken in several instances.” (citing 3 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2486–2488)); *see also* EMILY FIELD VAN TASSEL, WHY JUDGES RESIGN: INFLUENCES ON JUDICIAL SERVICE, 1789 TO 1992, at 25 n.79 (1993) (“Judge Turner’s case is of interest because it was dealt with during a period when Congress was still treating territorial judges in the same manner as Article III judges for the purposes of removal Territorial judges were the subject of a number of House investigations until the Supreme Court ruled in 1828 that territorial courts are legislative, not Constitutional Courts . . . , and the House Judiciary Committee concluded in 1833 that a territorial judge ‘is not a proper subject of trial by impeachment’”) (citation omitted). Nevertheless, of interest here is how the members of the First Congress treated territorial

confirmed by the Senate.²⁹² Yet, territorial judges also served under a term of good behavior.²⁹³

There is at least one instance in which a territorial judge was subject to impeachment proceedings which were later discontinued in favor of prosecution and removal by a local territorial court: in 1796, the House discontinued the very first impeachment proceedings it ever initiated, proceedings against a territorial judge, on the assurance that he would be prosecuted in the courts.²⁹⁴

On April 25, 1796, a petition was presented to the House of Representatives by the inhabitants of St. Clair County, in the Territory northwest of the Ohio River, alleging judicial misconduct.²⁹⁵ The petition catalogued Judge Turner's misconduct as follows:

[Y]our petitioners find themselves heavily aggrieved by the unexampled tyranny and oppressions used in this county by the honorable George Turner, one of the judges in and over this Territory, whilst on his circuit.

First, by holding a court unknown to and contrary to the laws of this Territory, and at the extremity of the of the population of the county, and compelling a great number of the good people of this county to attend thereat, as well suitors as jurors and civil officers of the county, thereby absenting themselves from their abodes, and exposing many families to the ravages of the hostile Indians, and to the great loss and damage of the good people by heavy charges that attend the majority travelling sixty-six miles to attend that court.

By heavy fines set and levied by the said court; by forfeitures incurred of the property of citizens quietly traveling on the Ohio; and the people grieved in various other ways, by suits and prosecutions in the same court, attended with very heavy charges.

judges for purposes of removal: they treated them as Article III judges.

292. The Act of August 7, 1789 provided that "the President shall nominate, and by and with the advice and consent of the Senate, shall appoint all officers which by the said [Northwest] ordinance were to have been appointed by the United States in Congress assembled." Act of Aug. 7, 1789, ch. 8, § 1, 1 Stat. 50, 53.

293. An Ordinance for the Government of the Territory of the United States north-west of the river Ohio provided that "[t]here shall also be appointed a court to consist of three judges . . . and their commissions shall continue in force during good behaviour." *Id.* at 51 n.a.

294. 1 AM. STATE PAPERS (MISC.) 151-52 (1834).

295. *Id.*

By compelling the register to transport the office to the extremity of the population of the county, thereby rendering it unsafe, as well as inconvenient for the people to have recourse to the office.

By denying us, as we conceive, the rights reserved to us by the constitution of the Territory, to wit, the laws and customs heretofore used in regard to the descent and conveyance of property, in which the French and Canadian inhabitants conceive the language an essential.

By taking possession of intestate estates, converting part thereof into ready money, to the great damage of the heirs and creditors, and carrying the same money away with him; the remaining goods left in a loose manner, without any account whatever to satisfy those who have claims.

We therefore pray that your honorable House will take into consideration the injuries we have sustained by the conduct of the honorable George Turner, in this county, and provide us such remedy as you, in your wisdom, may judge expedient²⁹⁶

Interestingly, these charges sound of abuse of power generally rather than violations of specific statutory law. The House referred the petition to a committee, and the matter was subsequently referred to the Attorney General for his opinion.²⁹⁷ On May 9, Attorney General Charles Lee transmitted his opinion, as follows:

That the charges exhibited in the petition against Judge Turner, and especially the first, second, and fifth, are of so serious a nature as to require that a regular and fair examination into the truth of them should be made, *in some judicial course of proceeding*; and if he be convicted thereof, *a removal from office may and ought to be a part of the punishment*. His official tenure is during good behavior: and, consequently, he cannot be removed until he be lawfully convicted of some malversation in office. A judge may be prosecuted in three modes, for official misdemeanors or crimes: by information, or by indictment before an ordinary court, or by impeachment before the Senate of the United States. The last mode, being the most solemn, seems, in general cases, to be the best suited

296. *Id.*

297. 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 2486, at 982 (noting the committee was composed of Theophilus Bradbury of Massachusetts, Nicholas Gilman of New Hampshire, Thomas Hartley of Pennsylvania, John Heath of Virginia, and Alexander D. Orr of Kentucky). Nicholas Gilman, one of the members of the committee, was a delegate to the Constitutional Convention. See JOSEPH C. MORTON, SHAPERS OF THE GREAT DEBATE: THE CONSTITUTIONAL CONVENTION OF 1787: A BIOGRAPHICAL DICTIONARY 114 (Greenwood Press 2006).

to the trial of so high and important an officer; but, in the present instance, it will be found very inconvenient, if not entirely impracticable, on account of the immense distance of the residence of the witnesses from this city [Philadelphia, the nation's capital at the time].

. . . [T]he Attorney General is of the opinion that it will be more advisable, on account of the expense, the delay, the certain difficulty, if not impossibility, of obtaining the attendance here of the witnesses who reside in the Territory northwest of the Ohio . . . that the prosecution should not be carried on by impeachment, but by information or indictment before the supreme court of that Territory, which is competent to the trial²⁹⁸

Attorney General Lee described the complaints regarding Judge Turner as charges “of oppression and gross violations of private property, *under color of his office*.”²⁹⁹ The reference to oppression and gross violations of private property “under color of his office” indicates that the complaints related to “oppressive” decisions regarding private property handed down as part of the judge’s official duties. Attorney General Lee’s reference to the “second” charge also refers specifically to the charge relating to the imposition of heavy fines and ordered property forfeitures.

The Attorney General also wrote that the charges:

have been lately transmitted to the President of the United States [and] the Secretary of State has been by him instructed to give orders to Governor St. Clair [the Governor of the Ohio territory] to take the necessary measures for bringing that officer to a fair trial, respecting those charges, before the court of that Territory.³⁰⁰

George Washington was the President in 1796.

The report of the Attorney General was referred back to the House committee on May 10, 1796, which was directed to “examine the matter thereof, and report the same, with their opinion thereupon, to the House.”³⁰¹ And, on February 27, 1797, that committee reported its opinion that the case should be heard before a court in the Territory.³⁰²

298. 1 AM. STATE PAPERS (MISC.) 51 (1834) (emphasis added).

299. *Id.* (emphasis added).

300. *Id.*

301. JOURNAL OF THE HOUSE (First Session, 4th Cong.), at 522.

302. 6 ANNALS OF CONG. 2320 (Joseph Gales ed., 1834) (“Mr. Bradbury, from the committee to

XII. THE VIEWS OF MADISON, JEFFERSON, LINCOLN, AND OTHER PROMINENT POST-FOUNDING FIGURES ON THE MOST LEGITIMATE MEANS OF CORRECTING CONSTITUTIONAL ERRORS

It may be striking to the modern reader that the First Congress enacted statutes severely limiting the jurisdiction of the federal courts. It did so in a way that favored upholding federal laws, that gave it complete control over procedure in federal courts, and that provided a means by which federal judges could remove other federal judges in addition to the means of congressional impeachment. But that is all less surprising when one understands that the Founders, and some of the most prominent American leaders who followed them, did not view the federal courts as the most legitimate means of correcting constitutional errors.

James Madison saw popular elections, not judicial review, as the most legitimate means of correcting constitutional errors. Madison wrote that constitutional disputes could not ultimately be resolved “without an appeal to the people themselves, who, as the grantors of the commission, can alone declare its true meaning, and enforce its observance.”³⁰³ Madison also wrote in *Federalist* No. 51 that “[a] dependence on the people is, no doubt, the primary control on the government.”³⁰⁴ Madison responded to the question “what is to controul Congress” when it exceeds its constitutional authority with the answer: “Nothing within the pale of the Constitution but sound argument & conciliatory expostulations addressed both to Congress & to their Constituents.”³⁰⁵ And Madison observed that among the most important devices for securing the sovereignty of the People, matched only by “a circulation of newspapers through the entire body of the people,” was “Representatives going from, and returning among every part of them.”³⁰⁶

Thomas Jefferson lamented that:

the germ of dissolution of our federal government is in the constitution of the federal judiciary; an irresponsible body, (for impeachment is scarcely a scare-crow,) working like gravity by

whom was referred the petition of Judge Turner; also that of some inhabitants of the Northwestern Territory, with the report made last session thereon, reported. The committee recommended that the case should come to a hearing before the Court of that Territory, where the Judge would have an opportunity to defend himself against the charges brought against him.”). It appears that Judge Turner resigned his judgeship shortly thereafter in the winter of 1797–1798. F.E. SCOBIE & E.W. DOTY, *THE BIOGRAPHICAL ANNALS OF OHIO* 144 (1905).

303. *THE FEDERALIST* NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

304. *THE FEDERALIST* NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

305. Letter from James Madison to Spencer Roane (May 6, 1821), in *MADISON: WRITINGS* 772, 774 (Jack N. Rakove, ed., 1999).

306. James Madison, *Public Opinion*, *NAT’L GAZETTE* (Dec. 19, 1791), reprinted in *14 PAPERS OF JAMES MADISON* 179 (Robert A. Rutland et al. eds., 1975) (emphasis omitted).

night and by day, gaining a little to-day and a little to-morrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped³⁰⁷

Responding to the argument that federal judges are the final interpreters of the Constitution, Jefferson wrote:

You seem to consider the [federal] judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one that would place us under the despotism of an oligarchy. Our judges are as honest as other men are and no more so. They have with others the same passions for party, for power, and the privilege of their corps. . . . [T]heir power is more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control.³⁰⁸

Jefferson strongly denounced the notion that the federal judiciary should always have the final say on constitutional issues:

If [such] opinion be sound, then indeed is our Constitution a complete *felo de se* [act of suicide]. For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation. . . . The constitution, on this hypothesis,

307. Letter from Thomas Jefferson to Charles Hammond (Aug. 18, 1821), in 15 THE WRITINGS OF THOMAS JEFFERSON 331–32 (Albert Ellery Bergh ed., 1903). It is also interesting to note that Alexander Hamilton apparently believed that the “usurpation” of power by federal judges could be an impeachable offense. According to Hamilton,

There never can be danger that the judges, by a series of deliberate *usurpations* on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body [the legislature] was possessed of the means [impeachment] of punishing their presumption by degrading them from their stations.

THE FEDERALIST NO. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). It therefore appears that Hamilton believed the “usurpation” of power by federal judges would be a legitimate cause for impeachment. See also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, J.) (stating that the Supreme Court “ha[s] no more right to decline the exercise of jurisdiction which is given, than to *usurp* that which is not given. *The one or the other would be treason to the constitution.*”) (emphasis added). Today, of course, there is scant prospect of impeachment when federal judges overstep their authority.

308. Letter from Thomas Jefferson to William C. Jarvis (1820), in S.E. FORMAN, THE LIFE AND WRITINGS OF THOMAS JEFFERSON 276 (2d ed., 1900) (emphasis added).

is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.³⁰⁹

As early as 1823, Jefferson observed:

At the establishment of our constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions, nevertheless, become law by precedent, sapping, by little and little, the foundations of the constitution, and working its change by construction, before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance. In truth, man is not made to be trusted for life, if secured against all liability to account.³¹⁰

Abraham Lincoln said in his first inaugural address in 1861:

[T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.³¹¹

More recently, Judge Learned Hand rejected rule by nine “Platonic Guardians,”³¹² writing, “If we do need a third [legislative] chamber it should appear for what it is, and not as the interpreter of inscrutable principles.”³¹³

As Larry Kramer has written in his book *The People Themselves*, the Supreme Court was never intended to be the ultimate authority on constitutional issues, and only in recent decades has the notion that the Supreme Court is the final authority on constitutional issues taken hold in popular opinion. As Kramer describes it:

309. Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 10 THE WRITINGS OF THOMAS JEFFERSON 141 (Paul Leicester Ford ed., 1899).

310. Letter from Thomas Jefferson to Monsieur A. Coray (Oct. 31, 1823), in 15 THE WRITINGS OF THOMAS JEFFERSON 486–87 (Albert Ellery Bergh ed., 1905).

311. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 268 (Roy P. Basler ed., 1953).

312. LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

313. *Id.* at 70.

[The Founders'] Constitution remained, fundamentally, an act of popular will: the people's charter, made by the people. . . . [I]t was "the people themselves"—working through and responding to their agents in the government—who were responsible for seeing that it was properly interpreted and implemented. The idea of turning this responsibility over to judges was simply unthinkable.

. . . .
This modern understanding [of judicial review] is . . . of surprisingly recent vintage. It reflects neither the original conception of constitutionalism nor its course over most of American history.³¹⁴

It was the original understanding that

[n]o one of the branches [of government] was meant to be superior to any other, unless it were the legislature, and when it came to constitutional law, all were meant to be subordinate to the people . . . [I]n a regime of popular constitutionalism it was not the judiciary's responsibility to enforce the constitution against the legislature. It was the people's responsibility: a responsibility they discharged mainly through elections

. . . .
. . . It was the legislature's delegated responsibility to decide whether a proposed law was constitutionally authorized, subject to oversight by the people.³¹⁵

Explaining why there is not any mention of judicial review in the Constitution, Kramer writes:

Judicial review was not the question before the [Constitutional] Convention. The question was how best to prevent the enactment of unwise and unconstitutional federal legislative measures. The answer was an executive veto. (And not just a veto, either. Additional checks on the risk of bad legislation included federalism, bicameralism, and the likelihood that "the best men in the Community would be comprised in the two branches of [Congress].") Some delegates were afraid that the executive might

314. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7–8 (2004).

315. *Id.* at 58–59.

be too weak, but a solid majority felt otherwise and were concerned not to involve judges in the lawmaking process. That settled, there was simply no need to say or do anything more.

... This is why courts and judicial review were so rarely featured during ratification: members of the Founding generation had a different paradigm in mind. The idea of depending on judges to stop a legislature that abused its power never even occurred to the vast majority of participants in the debates.³¹⁶

As Kramer has described modern history, however:

[A]s Warren Court activism crested in the mid-1960s, a new generation of liberal scholars discarded opposition to courts and turned the liberal tradition on its head by embracing a philosophy of broad judicial authority. . . .

... [T]he main body of liberal intellectuals put aside misgivings about electoral accountability, frankly conceding that judicial review might be in tension with democracy while justifying any trade-off on the ground that courts could advance the more important cause of social justice.³¹⁷

XIII. THE EARLY AND LONG-ENDURING PRINCIPLE THAT ONLY CLEARLY UNCONSTITUTIONAL STATUTES SHOULD BE STRUCK DOWN

As federal courts, led by the Supreme Court, have come to understand the scope of their authority in increasingly broad ways, they have also come to deviate wildly from a principle that had long prevailed among the Founders and the early federal courts. That principle was that judges should not exercise the jurisdiction they were granted by Congress to strike down statutes unless such statutes were unconstitutional “beyond dispute.” That this principle of self-restraint prevailed was one of the reasons that the Founders understood the federal judiciary as by far the weakest branch, and it explains why they found it unnecessary to devote any significant time to debating the powers of the federal judiciary at the Constitutional Convention.

That principle is reflected in *The Federalist Papers*, in which Alexander Hamilton wrote that it is the duty of federal judges only to declare void “acts

316. *Id.* at 77, 91 (quoting Elbridge Gerry, Federal Convention delegate, Comments at the Federal Convention (July 17, 1787), in 2 FARRAND, *supra* note 23, at 98).

317. *Id.* at 223.

contrary to the *manifest tenor* of the Constitution.”³¹⁸ It is also reflected in the views expressed by those on the early Supreme Court, where even early supporters of the concept of “judicial review,” such as James Iredell,³¹⁹ conceded that when the courts, including the Supreme Court, were to decide constitutional issues regarding legislation, “[i]n all doubtful cases . . . the Act ought to be supported” and that “it should be unconstitutional beyond dispute before it is pronounced such.”³²⁰ As Larry Kramer has described it, “This limiting principle instantly became an article of faith among the supporters of judicial review, accompanying virtually every statement of the doctrine.”³²¹ The “doubtful case” rule also explains why judges invariably illustrated their practical understanding of judicial review by using examples of obviously unconstitutional laws.³²²

318. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961). According to noted historian Gordon Wood:

Even those who agreed that many of the laws passed by the state legislatures in the 1780s were unjust and even unconstitutional nevertheless could not agree that judges ought to have the authority to declare such legislation void. For judges to declare laws enacted by popularly elected legislatures as unconstitutional and invalid seemed flagrantly inconsistent with free popular government. . . .

Most Americans, even those deeply concerned with the legislative abuses of the 1780s, were too fully aware of the modern positivist conception of law (made famous by Blackstone in his *Commentaries of the Laws of England*), too deeply committed to consent as the basis of law, and from their colonial experience too apprehensive of the possible arbitrariness and uncertainties of judicial discretion to permit judges to set aside laws made by the elected representatives of the people. “This,” said a perplexed [James] Madison in 1788, “makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper.”

Gordon S. Wood, *Judicial Review in the Era of the Founding*, in *IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION?* 158 (Robert A. Licht ed., 1993).

319. See HARRINGTON, *supra* note 135, at 177–78.

320. Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), in 2 GRIFFITH JOHN MCREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 175 (1857).

321. KRAMER, *supra* note 314, at 65.

322. See, e.g., *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 309 (1795) (“If the Legislature had passed an act declaring, that, in future, there should be no trial by Jury, would it have been obligatory? No: It would have been void for want of jurisdiction, or constitutional extent of power.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179–80 (1803) (“It is declared [in the Constitution] that ‘no tax or duty shall be laid on articles exported from any state.’ Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law. The constitution declares that ‘no bill of attainder or *ex post facto* law shall be passed.’ If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve? ‘No person,’ says the constitution, ‘shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.’ Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from.

Justice Iredell also recorded Justice Wilson and Judge Peters agreeing on circuit in *United States v. Ravara*³²³ that “tho’ an Act of Congress plainly contrary to the Constitution was void, yet no such construction should be given in a doubtful case.”³²⁴ Justice Chase similarly announced in *Calder v. Bull*³²⁵ that “if I ever exercise the jurisdiction [to review legislation,] I will not decide *any law to be void, but in a very clear case*,”³²⁶ reiterating a point he had made previously in *Hylton v. United States*.³²⁷ Justice Bushrod Washington said much the same thing in *Cooper v. Telfair*³²⁸, noting that “[t]he presumption, indeed, must always be in favour of the validity of laws, if the contrary is not clearly demonstrated.”³²⁹ William Paterson, who, next to Ellsworth, was a principal drafter of the Judiciary Act of 1789 in the First Congress,³³⁰ and who also became a Supreme Court Justice, agreed, observing in the same case that “to authorise this Court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication.”³³¹

Indeed, as Larry Kramer has written, for most of the earlier part of American history:

Judges did not typically intervene unless the unconstitutionality of a law was clear beyond doubt, which as a practical matter left questions of policy and expediency to politics. They also shied away from divisive social conflicts—at least in their constitutional jurisprudence, and in sharp contrast to their handling of private

If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act? From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.”)

323. 2 U.S. (2 Dall.) 297, 27 F. Cas. 713 (C.C.D. Pa. 1793) (No. 16,122).

324. CASTO, EARLY REPUBLIC, *supra* note 59, at 223 (quoting Iredell).

325. 3 U.S. (3 Dall.) 386 (1798).

326. *Id.* at 395.

327. 3 U.S. (3 Dall.) 171, 173, 175 (1796).

328. 4 U.S. (4 Dall.) 14 (1800).

329. *Id.* at 18. Years earlier, George Washington had complained to his nephew Bushrod (before he became a Supreme Court Justice) about the stubborn unwillingness of Anti-Federalists to recognize how the Constitution places in the legislative body the ultimate authority to uphold constitutional norms. Washington wrote, “The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and for a certain limited period, to *representatives* of their own chusing . . .” Letter from George Washington to Bushrod Washington (Nov. 10, 1787), in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 154 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (emphasis added). Years later, Justice Bushrod Washington would also state that “[i]t is but a decent respect due to . . . the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt.” *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827).

330. Casto, *Oliver Ellsworth*, *supra* note 14, at 298.

331. *Cooper*, 4 U.S. (4 Dall.) at 19.

law—striking laws down only in the situations where judicial intervention was least likely to be controversial. Courts were generally respectful of political outcomes, acting in a manner that remained consistent with long-standing practices of popular constitutionalism.³³²

The early Supreme Court adhered strictly to this principle, as evidenced by its sparse record of overturning federal statutes. Early on, it upheld a federal tax law at the expense of a contrary provision of state law in *Hylton v. United States*,³³³ and generally showed great reluctance to find even state laws unconstitutional. The only case prior to the Civil War in which the Court held a state law unconstitutional was *Ware v. Hylton*.³³⁴ During the same period, the Supreme Court struck down only two federal statutes, one in *Marbury*³³⁵ and the other in the notorious *Dred Scott*³³⁶ decision, in which the Court, striking down the Missouri Compromise, dubiously held that Congress could not prohibit slavery in a territory because to do so would violate the Fifth Amendment's protections of private property.³³⁷ As Dean Kramer has written:

Dred Scott stuck out like a sore thumb partly because it was so unprecedented for the Supreme Court to assert its will over and against Congress. . . .

. . . .
 . . . Having found only two federal laws unconstitutional during the entire antebellum period (in *Marbury* and *Dred Scott*), the Court [then] struck down four federal statutes in the 1860s alone, followed by seven in the 1870s, four more in the 1880s, and five in the 1890s. While these numbers seem small by comparison to today (the Court struck down thirty federal laws between 1990 and 2000, for example, the most in its history), the change was striking enough to

332. KRAMER, *supra* note 314, at 150 (citations omitted).

333. 3 U.S. (3 Dall.) 171 (1796).

334. 3 U.S. (3 Dall.) 199 (1796).

335. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803) (upholding the relatively uncontroversial position that the original jurisdiction of the Supreme Court is fixed by the Constitution and cannot be enlarged by statute).

336. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

337. *Id.* at 450.

convince some commentators that it was only in this period that judicial review “really” became established.³³⁸

XIV. THE RISKS POSED TO THE POPULAR LEGITIMACY OF THE SUPREME COURT BY ITS MODERN TENDENCY TO STRIKE DOWN STATUTES BY NARROW MARGINS

Charles Warren, in 1923, described a situation that seems alien to those of us who today live an era in which split 5–4 decisions regarding the constitutionality of statutes are commonplace in the Supreme Court.³³⁹ Warren described the much different judicial norms that prevailed then as follows:

One . . . factor which has strengthened the [Supreme] Court in popular confidence and which has greatly served to lessen the chances of friction between the component parts of the Federal system of government has been the voluntary limitation upon the exercise of its own power which the Court has adopted as a rule of practice. This limitation . . . was first set forth by Judge Iredell in 1798, when he stated that, as the authority to declare a statute void “is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case.”³⁴⁰

The modern Supreme Court appears to have largely abandoned that “rule of practice,” as it has demonstrated an increasing tendency to strike down federal statutes in narrow 5–4 decisions. When the Court strikes down legislation with a bare majority of votes, it is clearly not comporting with the maxim that statutes should only be struck down when they are “contrary to the *manifest tenor* of the Constitution,”³⁴¹ because in such cases forty-four percent of the Justices in the case cannot see what should be a “manifest” constitutional violation.

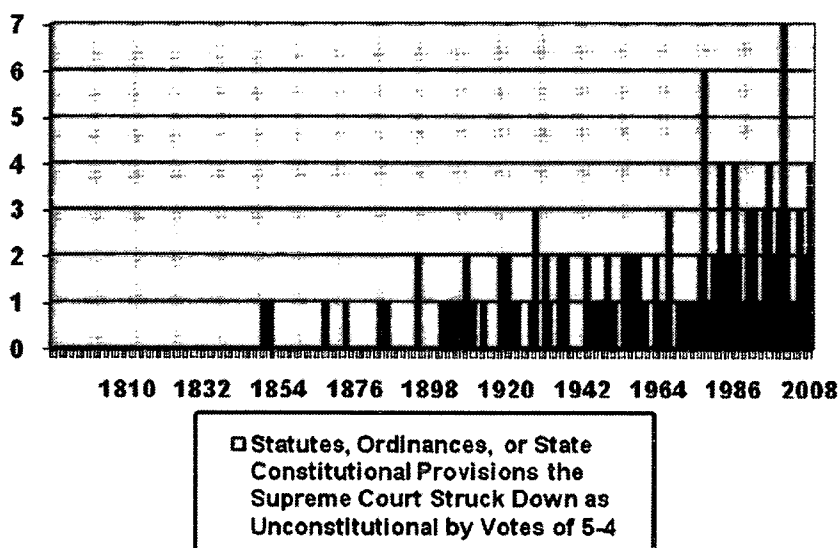
338. KRAMER, *supra* note 314, at 213 (citing CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION (1998)).

339. More generally, in the 2006–2007 term, a full third of the Supreme Court’s decisions were decided by 5–4 margins. See Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1.. A single Justice—Anthony Kennedy—was in the majority in every case decided 5–4. See *id.*

340. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 23–24 & 24 n.1 (1923) (string citing cases supporting the proposition that legislation should only be struck down in clear cases of unconstitutionality).

341. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). Johnson’s Dictionary, first published in 1755 and one of the most influential dictionaries of the English language, defined “manifest” as “plain, evident, clear.” JOHNSON’S DICTIONARY 209 (Charles J. Hendee ed., 1836).

The Supreme Court did not strike down a statute as unconstitutional by a vote of 5–4 until its 1849 decision in the *Passenger Cases*,³⁴² which struck down a New York and a Massachusetts law. It continued to do so relatively infrequently, until just after Charles Warren wrote the article quoted above in 1923.³⁴³ Starting in the mid-1920s and accelerating after the 1960s, the Supreme Court, with much greater frequency, has struck down as unconstitutional, on narrow 5–4 margins, federal and state statutes, and local ordinances and state constitutional provisions, as illustrated by the graph below.³⁴⁴ The x-axis shows the number of statutes, ordinances, or state constitutional provisions struck down, and the y-axis shows the year in which the Supreme Court struck them down.



To take just two examples from its October 2007 term, the traditional rule that the Supreme Court should only strike down a statute as

342. 48 U.S. (7 How.) 283 (1849).

343. See *supra* note 340 and accompanying text.

344. For a full listing and description of the cases summarized in the graphic, see Appendix C to this Article.

unconstitutional in clear cases was certainly not followed by the Court's 5–4 majority opinion in *Boumediene v. Bush*.³⁴⁵ In that opinion, written by Justice Kennedy, a key portion of the Military Commissions Act was struck down as unconstitutional, and unlawful enemy combatants, for the first time in history, were granted habeas litigation rights to challenge their detention in federal court.³⁴⁶ Five Justices struck down balanced legislation on the subject, even though the majority admitted in its opinion that it was operating under a “lack of historical evidence on point”³⁴⁷ and that “the cases before us lack any precise historical parallel.”³⁴⁸

The rule was also abandoned in the Court's decision in *Kennedy v. Louisiana*,³⁴⁹ in which it held, 5–4, that a Louisiana statute that imposed the death penalty for the rape of a child was unconstitutional.³⁵⁰ As Justice Alito pointed out in his dissent:

The Court today holds that the Eighth Amendment categorically prohibits the imposition of the death penalty for the crime of raping a child. This is so, according to the Court, no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator's prior criminal record may be.³⁵¹

More important from the perspective of popular legitimacy, however, was that the majority decision in the *Kennedy* case rested in large part not on evidence it deemed lacking or off-point, as it did in its *Boumediene* decision, but on evidence that was subsequently found to be demonstrably false. The majority decision was based largely on its determination that Congress had not imposed the death penalty for the rape of a child, and thus, there was no

345. 128 S. Ct. 2229 (2008).

346. *See id.* at 2277.

347. *Id.* at 2251.

348. *Id.* at 2262. For an analysis of the constitutional and historical precedents to which the majority gave short shrift or ignored in its *Boumediene* decision, and for a review of the provisions crafted by Congress and the President that the Court struck down, see Paul Taylor, *The Historical and Legal Norms Governing the Detention of Suspected Terrorists and the Risks Posed by Recent Efforts to Depart from Them*, 12 TEX. REV. L. & POL. 223 (2008).

349. 128 S. Ct. 2641 (2008).

350. *Id.* at 2646. Justice Kennedy, writing for the Court, so held even though, as he admitted, the “crime was one that cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted on his victim or to convey the revulsion society, and the jury that represents it, sought to express by sentencing petitioner to death.” *Id.*

351. *Id.* at 2665 (Alito, J., dissenting).

evidence of a national consensus in favor of imposing the death penalty for child rape.³⁵² However, as was widely reported following the decision:

Three days after the decision was handed down, a military reservist and lawyer who blogs on military justice issues pointed out that in fact, contrary to what the Court had said, there is a federal statute expressly authorizing capital punishment for child rape. The National Defense Authorization Act for Fiscal Year 2006 is the law, and in its revision of the sex crimes section of the Uniform Code of Military Justice it explicitly authorizes the death penalty for soldiers who commit child rape.

As it happened, not just the *Kennedy* majority failed to notice the existence of this federal law. So did the four dissenting justices. So did petitioner Kennedy and respondent Louisiana [sic]. Moreover, none of the 10 friends of the court in the case, not even one, cited the law. Neither did the solicitor general's office, which represents the government in the Supreme Court and on which the Court counts to advise it regarding any federal interest (such as a federal statute) that might be implicated in a case in which the government is not a party. Indeed, the solicitor general didn't even file a brief in *Kennedy*, a failure the Justice Department now regrets

This [was a] remarkably complete failure to take notice of an obviously relevant federal law³⁵³

Laurence Tribe of Harvard Law School wrote of that case:

[T]here was a problem with the court's understanding of the basic facts. It failed to take account—because nobody involved in the

352. See *id.* at 2651–52 (majority opinion) (“The existence of objective indicia of consensus against making a crime punishable by death was a relevant concern in [previous cases] and we follow the approach of those cases here. . . . As for federal law, Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence, including certain nonhomicide offenses; but it did not do the same for child rape or abuse.”). The Court ultimately concluded that “[b]ased both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments.” *Id.* at 2650–51.

353. Terry Eastland, *Supremely Screwed Up*, WEEKLY STANDARD, Aug. 4, 2008, at 12. Section 552(b)(1) of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136, 3263 (2006), specifies maximum sentences as follows: “For an offense under subsection (a) (rape) or subsection (b) (rape of a child), death or such other punishment as a court-martial may direct.”

case had noticed—that in 2006 no less an authority than Congress, in the National Defense Authorization Act, had prescribed capital punishment as a penalty available for the rape of a child by someone in the military.

... [The Court's] credibility depends on both candor and correctness when it comes to the factual predicates of its rulings.³⁵⁴

Ironically, in *Kennedy*, the Court not only abandoned the longstanding rule designed to protect statutes enacted by duly elected legislatures, but it did so by relying on the absence of another duly enacted statute that it neglected to recognize existed.

The analysis of the national “consensus” relied on by the Court suffered further with the results of polls showing that a majority of Americans supported the availability of the death penalty for child rape. For example, a Quinnipiac poll conducted in July 2008, asked: “The Supreme Court has recently ruled that a mandatory death penalty for child rape is unconstitutional. Do you favor or oppose the death penalty for persons convicted of child rape?” Fifty-five percent responded “Favor,” and only thirty-eight percent responded “Oppose.”³⁵⁵

The *Kennedy* case reveals a startling breakdown in the system of Supreme Court review in which a basic and arguably crucial fact related to its method of analysis failed to be caught by every cog attached to the judicial machinery, from the lawyers, to the judges on both sides, and to all the other parties that contributed their views on the issue at each stage of the judicial process. It reminds us again that the entire process by which courts decide cases is not the optimal means for developing informed public policy.

Larry Kramer has described what may have been the reaction of previous generations of Americans to the situation that exists today:

Neither the Founding generation nor their children nor their children's children, right on down to our grandparents' generation, were so passive about their role as republican citizens. They would not have accepted—did not accept—being told that a lawyerly elite had charge of the Constitution, and they would have been incredulous if told (as we are often told today) that the main reason to worry about who becomes president is that the winner will control judicial appointments. Something would have gone terribly wrong, they believed, if an unelected judiciary were being given

354. Laurence H. Tribe, *The Supreme Court Is Wrong on the Death Penalty*, WALL ST. J., July 31, 2008, at A13.

355. See Quinnipiac University Polling Institute, *American Voters Oppose Same-Sex Marriage Quinnipiac University National Poll Finds, But They Don't Want Government to Ban It* (July 17, 2008), <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1194>.

that kind of importance and deference. Perhaps such a country could still be called democratic, but it would no longer be the kind of democracy Americans had fought and died and struggled to create.³⁵⁶

Today, following a much greater frequency of controversial 5–4 decisions handed down by the Court, it is not surprising that the public's general approval of the Supreme Court has dramatically declined over the last several years, such that its approval rating in 2008 was only 39%, down from 56% five years previously in 2003.³⁵⁷ The Gallup organization has also reported that only 32% of those surveyed in 2008 had a “great deal” or “quite a lot” of confidence in the Court, down from 44% in 1973, when Gallup conducted its first poll of the reputation of the Court among the public.³⁵⁸ Whether this trend will result in a renewal of the understanding of earlier generations, as Larry Kramer describes, remains to be seen.

XV. CONCLUSION

The Supreme Court has declared itself the “ultimate interpreter of the Constitution,”³⁵⁹ which implies that it is also the ultimate arbiter of the constitutional powers of Congress over the Supreme Court's jurisdiction. If that is true, then the Court alone is the master of its own domain. The Supreme Court has also stated, albeit in dicta, that Article III courts are “presided over by judges appointed for life, subject *only* to removal by impeachment.”³⁶⁰ Both statements are, in many ways, placed in doubt by the enactments of the First Congress and the actions of the former members of the Constitutional Convention who served in it.

Even before the First Congress, a constitutional provision was rejected that would have given the Supreme Court veto power over legislation on the grounds that even that proposal gave too much power to the Court, even when the provision under consideration would have given Congress the

356. KRAMER, *supra* note 314, at 228.

357. See <http://www.pollingreport.com/court2.htm> (Quinnipiac poll of 3,097 registered voters) (July 8–13, 2008).

358. See Gallup, *Confidence in Institutions* (June 14–17, 2009), <http://www.gallup.com/poll/1597/Confidence-Institutions.aspx>.

359. *Baker v. Carr*, 369 U.S. 186, 211 (1962); see also *Powell v. McCormack*, 395 U.S. 486, 549 (1969) (“[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution.”); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution.”).

360. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955) (emphasis added).

power to override any veto by the Court.³⁶¹ Instead, a judiciary provision was supported that James Madison understood to provide courts with the power to decide cases only “of a Judiciary Nature,” something much narrower than the power to expound on all cases that could arise under the Constitution.³⁶² And the only cases the Constitution required any federal court to have jurisdiction over were those involving ambassadors and in which a state was a party.³⁶³ That Constitution was defended in the *Federalist Papers* on the grounds that the federal courts it allowed were “next to nothing,” and, in any case, the Constitution allowed Congress to remove any “inconveniences” the federal courts should present in order to “best answer the ends of public justice and security.”³⁶⁴

The First Congress, whose expressed understanding of the Constitution should hold great weight, overwhelmingly enacted the Judiciary Act of 1789, which prohibited review in any federal court of state court decisions that upheld federal provisions, even when federal constitutional claims were raised, significantly restricting federal court jurisdiction in a way specifically designed to increase the chances federal statutes would be upheld.³⁶⁵ It also contained a significant amount in controversy limit on jurisdiction, and no general federal question jurisdiction, leaving a huge variety of cases involving, among others, constitutional, tort, and contract issues—including those required to be heard under the Treaty of Paris—beyond the reach of any federal court. The regime established by section 25 of the Judiciary Act was only replaced when Congress amended the Act in 1914 to allow Supreme Court review of state court decisions upholding federal provisions, and Congress did so then simply to produce yet another substantive result, namely the upholding of state workers compensation laws.³⁶⁶

The Process Act of 1789, also enacted by the First Congress, dictated precisely what procedures would govern in federal courts, a power Congress was recognized as having under its legislative powers.³⁶⁷

And the Crimes Act of 1790 provided for a means of allowing federal judges to remove other federal judges from office supplemental to and independent of the impeachment process.³⁶⁸ That independent removal process was entirely consistent with the hornbook understanding at the time: that life tenure subject to good behavior could be lost following convictions

361. See *supra* notes 23–27 and accompanying text.

362. See *supra* notes 28–33 and accompanying text.

363. See *supra* notes 35–36 and accompanying text.

364. THE FEDERALIST NO. 81, at 490 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see *supra* Part IV.

365. See *supra* Parts VI.A–B.

366. See *supra* Part VII.

367. See *supra* Part X.A.

368. See *supra* Parts XI.A–B.

in court.³⁶⁹ It was also consistent with the views of the most prominent Founders,³⁷⁰ with the contemporaneous state laws requested to be reviewed by the drafters of the Act,³⁷¹ with similar statutes enacted by the First Congress regarding the court removal of civil officers of the United States,³⁷² and with the House of Representatives's decision to allow the removal of a territorial judge through court process in 1796 following allegations that the judge had abused his power.³⁷³

Oliver Ellsworth, the driving force behind all three Acts and the man dubbed the "father of the national judiciary,"³⁷⁴ was one of only five members of the Committee of Detail who issued the first draft of the Constitution at the Constitutional Convention. He was later appointed by George Washington to be the third Chief Justice of the United States,³⁷⁵ in which capacity he supported Congress's broad powers over federal court jurisdiction, the same view he held during the ratification debates.³⁷⁶

The restrictions the First Congress placed on the federal courts, and Congress's control over the federal judiciary generally, are entirely consistent with *Marbury v. Madison*.³⁷⁷ *Marbury* established the principle of judicial review and stands for the proposition that the Supreme Court is the final decision-maker for issues within its original jurisdiction or under its authority by express statutory grant. If a case does not fall within the jurisdiction of the federal courts because Congress has not granted the required jurisdiction, federal courts simply cannot hear the case. The author of *Marbury*, Chief Justice John Marshall, after he decided *Marbury*, himself dismissed cases when Congress had not granted federal courts jurisdiction to hear them under the Judiciary Act of 1789.³⁷⁸

369. See *supra* Part XI.C.

370. See *supra* Part XI.D.

371. See *supra* Part XI.E.

372. See *supra* Part XI.F.

373. See *supra* Part XI.G.

374. 1 GREAT AMERICAN LAWYERS, *supra* note 63, at 335.

375. See BROWN, *supra* note 16, at 238.

376. See *id.* at 133.

377. 5 U.S. (1 Cranch) 137 (1803). In *Marbury v. Madison*, the Supreme Court found that under Article III of the Constitution, a party within the Supreme Court's original jurisdiction must be a State or an ambassador and that neither *Marbury* nor *Madison* was a state or an ambassador. *Id.* at 173–75. Consequently, the Supreme Court held that the original jurisdiction of the Supreme Court is fixed by the Constitution, and it dismissed the case because Congress had exceeded its constitutional authority when it granted the Supreme Court, by mere statute, original jurisdiction to hear *Marbury*'s case in the Judiciary Act of 1789. *Id.*

378. See *Gordon v. Caldcleugh*, 7 U.S. (3 Cranch) 268, 269–70 (1806) (dismissing case for lack of jurisdiction under the Judiciary Act of 1789) ("This court has no jurisdiction, under the 25th section

Marbury stands for the relatively simple proposition that if the federal courts perceive Congress or the President as acting beyond their lawful authority, they may exercise their judicial power to decide the case in conformity with the Constitution and declare the statute or offending action unconstitutional.³⁷⁹ The other branches, of course, have counteracting powers as well. If the President believes Congress or the courts have overstepped their constitutional bounds, the President may use the veto power, or the pardon power, to counter them.³⁸⁰ And if Congress believes the Executive is exceeding its constitutional authority, Congress can use the power of the purse to deny funding to the executive branch so it cannot administer its unconstitutional actions.³⁸¹

But if this system is to maintain a popularly and constitutionally legitimate balance, it must contain an element in which, if Congress perceives the Supreme Court to be exceeding its own constitutional authority, Congress can use its legitimate powers to alter the jurisdiction of the federal courts to place limits on those courts, including the Supreme Court.³⁸² Without such an element, the Supreme Court, alone among all parts of the federal system, would be completely unchecked.³⁸³ It alone

of the judiciary act of 1789, but in a case where a final judgment or decree has been rendered in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question, the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is *against* their validity, &c. or where is drawn in question, the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is *against* the title, right, privilege or exemption, specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission. In the present case, such of the defendants as were aliens, filed a petition to remove the cause to the federal circuit court, under the 12th section of the same act. The state court granted the prayer of the petition, and ordered the cause to be removed; the decision, therefore, was not *against* the privilege claimed under the statute; and, therefore, this court has no jurisdiction in the case. The writ of error must be dismissed.”).

379. *Marbury*, 5 U.S. (1 Cranch) at 172–80.

380. See U.S. CONST. art. I, § 7, cl. 2 (veto power); U.S. CONST. art. II, § 2, cl. 1 (pardon power).

381. See U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”).

382. See U.S. CONST. art. III, § 2, cl. 2 (Supreme Court’s original jurisdiction); U.S. CONST. art. III, § 1, cl. 1 (Congress’s power to create lower federal courts); U.S. CONST. art. III, § 2, cl. 2 (Congress’s power to make exceptions to all federal courts’ appellate jurisdiction). Such congressional power, of course, is subject to the check in which members of an overreaching Congress may not be reelected by the people. See U.S. CONST. art. I, § 2, cl. 1 (House Members elected every two years); U.S. CONST. amend. XVII (Senators elected every six years).

383. Unlike federal judges, of course, the vast majority of state judges have fixed terms and must face periodic elections. Indeed, only three states—Massachusetts, New Hampshire, and Rhode Island—give judges what some call life tenure. See LARRY BERKSON ET AL., JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS 19–20 (1981). Judges in both Massachusetts and New Hampshire face a mandatory retirement age of seventy. See MASS. CONST. pt. 2, ch. 3, art. I; N.H. CONST. pt. 2, art. LXXVIII. New Jersey, which has no fixed term for judges after an initial seven year appointment, also has a mandatory retirement age of seventy. N.J. CONST. art. VI, § 6. In addition, in both Massachusetts and New Hampshire, judges may be removed by a

would be the judge of its own constitutional powers, no matter how poorly reasoned its decisions and no matter how dire the impact of those decisions, because the writing of poorly reasoned opinions alone does not constitute an impeachable “high Crime [or] Misdemeanor[.]”³⁸⁴ Additionally, the doctrine of judicial immunity provides judges with vast protection from lawsuits claiming their actions or inactions harmed the public health and safety.³⁸⁵

Such a system, constituting rule by five Justices, may be tolerated today, but it is dramatically inconsistent with the balance struck by the Founders and observed by many generations thereafter.³⁸⁶ That inconsistency has been greatly aggravated by the modern Supreme Court’s frequent abandonment of the formerly long-standing principle that even when the courts have jurisdiction to hear constitutional claims regarding federal statutes, the courts should not strike down statutes enacted by duly elected legislatures unless such statutes are unconstitutional, beyond dispute.³⁸⁷ Under that former consensus principle, only two federal statutes were struck down by the Supreme Court in the first 67 years of its existence,³⁸⁸ a far cry from the modern Court’s string of controversial 5–4 decisions striking down legislation, which have helped sink the Court’s stature to new lows in the estimation of the American public.³⁸⁹

If the increasing number of 5–4 decisions by the Supreme Court can be considered “political” decisions—in the sense that they result from sharp ideological disagreements regarding policy—then Congress may, following the First Congress, wish to increasingly restrict that Court’s and other

vote of both houses of the legislature. *See* MASS. CONST. pt. 2, ch. 3, art. I; N.H. CONST. pt. 2, art. LXXIII. The Rhode Island Supreme Court held that a provision allowing the Rhode Island legislature to declare a judicial office vacant had been implicitly repealed in 1893, *In re Advisory Opinion* (Chief Justice), 507 A.2d 1316, 1322 (R.I. 1986), making that state the only one in which judges truly have life tenure.

384. *See* U.S. CONST. art. II, § 4.

385. *See* *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871) (holding that “[j]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, *even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly*”) (emphasis added). The Supreme Court defined the scope of judicial immunity even more broadly in *Stump v. Sparkman*, 435 U.S. 349, 356 (1978), holding that “[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority”

386. *See supra* Parts XII–XIII.

387. *See supra* Part XIII.

388. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856); *see also supra* Part XIII.

389. *See supra* Part XIV.

federal courts' ability to replace Congress's own political judgments with the political judgments of unelected judges, and to limit the federal courts' anti-democratic influence.

APPENDIX A: SUPREME COURT PRECEDENTS AFTER 1799 REGARDING
CONGRESS'S POWER TO LIMIT FEDERAL COURT JURISDICTION

***Gordon v. Caldcleugh*, 7 U.S. (3 Cranch) 268 (1806).**

In *Gordon v. Caldcleugh*, the Court, through Chief Justice Marshall, held that the Supreme Court had no jurisdiction to review a decision of the highest state court when such decision was in favor of the validity of a federal law or an authority exercised under such law, stating that in the case below “[t]he state court granted the prayer of the petition” and “the decision . . . was not *against* the privilege claimed under the statute.”³⁹⁰

***Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810).**

Chief Justice Marshall, in *Durousseau v. United States*, wrote:

Had the judicial act created the Supreme Court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court as ordained by the constitution; and, in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished. The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.

When the first legislature of the union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

390. 7 U.S. (3 Cranch) 268, 270 (1806).

The spirit as well as the letter of a statute must be respected³⁹¹

***McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813).**

In *McIntire v. Wood*, the Court stated:

But although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its Circuit Courts, except in certain specified cases. When questions arise under those laws in the State Courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the Supreme Court, and *this provision the legislature has thought sufficient at present for all the political purposes intended to be answered by the clause of the constitution, which relates to this subject.*³⁹²

***Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845).**

In *Cary v. Curtis*, the Supreme Court upheld the application of a statute that placed jurisdiction for all claims of illegally charged customs duties with the Secretary of the Treasury. The Court stated that, under the statute, “it is the [S]ecretary of the Treasury alone in whom the rights of the government and of the claimant are to be tested.”³⁹³ In a broad decision, the Court upheld a federal statute that removed jurisdiction over all such claims from both the state and federal courts and dismissed the case for lack of jurisdiction:

It is contended, however, that the language and the purposes of Congress, if really what we hold them to be declared in the statute of 1839, cannot be sustained, because they would be repugnant to the Constitution, inasmuch as they would debar the citizen of his right to resort to the courts of justice. . . . [I]n the doctrine so often ruled in this court, that the judicial power of the United States,

391. 10 U.S. (6 Cranch) 307, 313–14 (1810).

392. 11 U.S. (7 Cranch) 504, 506 (1813) (emphasis added).

393. 44 U.S. (3 How.) 236, 241; *see also id.* at 242 (“To permit the receipts at the customs to depend on constructions as numerous as are the agents employed, as various as might be the designs of those who are interested; or to require that those receipts shall await a settlement of every dispute or objection that might spring from so many conflicting views, would be greatly to disturb, if not to prevent, the uniformity prescribed by the Constitution, and by the same means to withhold from the government the means of fulfilling its important engagements. . . . We have no doubts of the objects or the import of that act; we cannot doubt that it . . . has made the head of the Treasury Department the tribunal for the examination of claims for duties said to have been improperly paid.”).

although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. *To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely.* It follows, then, that the courts created by statute must look to the statute as the warrant for their authority, certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them. This argument is in no wise impaired by admitting that the judicial power shall extend to all cases arising under the Constitution and laws of the United States. Perfectly consistent with such an admission is the truth, that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature. The existence of the Judicial Act itself, with its several supplements, furnishes proof unanswerable on this point. The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.³⁹⁴

***Barry v. Mercein*, 46 U.S. (5 How.) 103 (1847).**

In *Barry v. Mercein*, the Supreme Court stated that “[b]y the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes.”³⁹⁵

394. *Id.* at 244–45 (emphasis added).

395. 46 U.S. (5 How.) 103, 119 (1847).

***Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).**

In *Sheldon v. Sill*, the Supreme Court stated:

It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result, —either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress; having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

. . . .

Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has been either directly advanced or tacitly assumed would be tedious and unnecessary.³⁹⁶

***Mayor v. Cooper*, 73 U.S. (6 Wall.) 247 (1868).**

In *Mayor v. Cooper*, the Supreme Court held that:

How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, are not prescribed. The Constitution is silent upon those subjects. They are remitted without check or limitation to the wisdom of the legislature.

. . . .

As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it. . . .

396. 49 U.S. (8 How.) 441, 448–49 (1850).

....

It is the right and the duty of the national government to have its Constitution and laws interpreted and applied by its own judicial tribunals. In cases arising under them, *properly brought before it*, this court is the final arbiter.³⁹⁷

***Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).**

In *Ex Parte Yerger*, the Court acknowledged explicitly and unequivocally that its appellate habeas corpus jurisdiction is given subject to regulation by Congress, stating:

It is proper to add, that we are not aware of anything [relevant] in any act of Congress . . . which indicates any intention to withhold appellate jurisdiction in *habeas corpus* cases from this court, or to abridge the jurisdiction derived from the Constitution and defined by the act of 1789. *We agree that it is given subject to exception and regulation by Congress . . .*³⁹⁸

***United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).**

In *United States v. Klein*, the Supreme Court struck down a statute that purported to deny the lower U.S. Court of Claims and the Supreme Court the authority to hear, on appeal, claims for property brought by those who were pardoned by President Lincoln following the Civil War.³⁹⁹ The Supreme Court held the statute unconstitutional for two reasons.⁴⁰⁰ First, because the statute made having received a pardon proof of disloyalty that effectively denied the right to federal judicial review, it found that in forbidding the Court “to give the effect to evidence which, in its own judgment, such evidence should have” and directing the court “to give it an affect precisely contrary,” Congress had “inadvertently passed the limit which separates the legislative from the judicial power.”⁴⁰¹ Second, the statute unconstitutionally “impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive.”⁴⁰²

397. 73 U.S. (6 Wall.) 247, 251–52 (1868) (emphasis added).

398. 75 U.S. (8 Wall.) 85, 102 (1869) (emphasis added).

399. 80 U.S. (13 Wall.) 128, 148 (1871).

400. *Id.* at 147.

401. *Id.*

402. *Id.*

In the opinion, however, the Supreme Court stated, “It seems to us that this is *not* an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.”⁴⁰³ Further, the Court stated:

*If [the challenged statute] simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make ‘such exceptions from the appellate jurisdiction’ as should seem to it expedient. But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have.*⁴⁰⁴

In other words, the denial of federal court jurisdiction would have been upheld if it had not effectively acted to limit the President’s constitutional pardon power.

The “Francis Wright,” 105 U.S. 381 (1881).

In *The “Francis Wright,”* the Supreme Court stated:

[W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not.⁴⁰⁵

Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898).

In *Plaquemines Tropical Fruit Co. v. Henderson*, the Court stated, “It is for Congress to say how much of the judicial power of the United States shall be exercised by the subordinate courts it may establish from time to time.”⁴⁰⁶

403. *Id.* at 146 (emphasis added).

404. *Id.* at 145 (emphasis added).

405. 105 U.S. 381, 385–86 (1881).

406. 170 U.S. 511, 521 (1898).

***Stevenson v. Fain*, 195 U.S. 165 (1904).**

In *Stevenson v. Fain*, the Supreme Court stated that “[t]he Supreme Court alone ‘possesses [original] jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it,’ but the jurisdiction of the Circuit Courts depends upon some act of Congress.”⁴⁰⁷

***Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922).**

In *Kline v. Burke Construction Co.*, the Supreme Court stated:

Only the [original] jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. . . . The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . . And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part. . . . A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right.⁴⁰⁸

The Court also stated that every inferior court “derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.”⁴⁰⁹

***Lauf v. E. G. Shinner & Co.*, 303 U.S. 323 (1938).**

In *Lauf v. E. G. Shinner & Co.*, the Supreme Court again upheld a statute that placed limits on the jurisdiction of the lower federal courts, stating:

[T]he power of the court to grant the relief prayed depends upon the jurisdiction conferred upon it by the statutes of the United States.

407. 195 U.S. 165, 167 (1904) (quoting *U.S. v. Hudson*, 11 U.S. (7 Cranch) 32, 32 (1812)).

408. 260 U.S. 226, 234 (1922) (internal citations omitted).

409. *Id.*

....
Section 7 [of the Act] declares that ‘no court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined’ [with certain exceptions] There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.⁴¹⁰

***Lockerty v. Phillips*, 319 U.S. 182 (1943).**

In *Lockerty v. Phillips*, the Supreme Court similarly held, in upholding a statute limiting lower courts’ jurisdiction over challenges to price controls, that:

[b]y this statute Congress has seen fit to confer on the Emergency Court (and on the Supreme Court upon review of decisions of the Emergency Court) equity jurisdiction to restrain the enforcement of price orders under the Emergency Price Control Act. At the same time it has withdrawn that jurisdiction from every other federal and state court. There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court. All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to “ordain and establish” inferior courts, conferred on Congress by Article III, § 1, of the Constitution. *Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe.* The Congressional power to ordain and establish inferior courts includes the power “of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.” In the light of the explicit language of the Constitution and our decisions, it is plain that Congress has power to provide that the equity jurisdiction to restrain enforcement of the Act, or of regulations promulgated under it, be restricted to the Emergency Court, and, upon review of its decisions, to this Court.⁴¹¹

410. 303 U.S. 323, 327, 329–30 (1938)

411. 319 U.S. 182, 187–88 (1943) (internal quotations and citations omitted) (emphasis added).

***Palmore v. United States*, 411 U.S. 389 (1973).**

In *Palmore v. United States*, the Court stated, “[Congress] was not constitutionally required to create inferior Art. III courts . . . Nor, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art. III.”⁴¹²

412. 411 U.S. 389, 401 (1973).

APPENDIX B: SUPREME COURT PRECEDENTS AFTER 1825 REGARDING
CONGRESS'S POWER OVER FEDERAL COURT PROCEDURE

***Livingston v. Story*, 34 U.S. (9 Pet.) 632 (1835).**

In *Livingston v. Story*, the Court reaffirmed Congress's power over procedure, relying on Article III as the source of Congress's authority.⁴¹³ The Court held that the district court in Louisiana was required to exercise equitable jurisdiction in diversity cases, despite the absence of an equitable practice in Louisiana state courts. In reaching that conclusion, Justice Thompson wrote:

That Congress has the power to establish circuit and district courts in any and all the states, and confer on them equitable jurisdiction in cases coming within the constitution, cannot admit of a doubt. It falls within the express words of the constitution. "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish." And that the power to ordain and establish, carries with it the power to prescribe and regulate the modes of proceeding in such courts, admits of as little doubt.⁴¹⁴

***Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166 (1867).**

In *Riggs v. Johnson County*, the Court stated:

Modes of process, and forms of process, were in use in the States at that period, other than such as were known at common law as understood in the English courts. Radical changes had been made in some of the States, not only in the forms of mesne process, and the rules of pleading, but in the modes of process in enforcing judgment, as was well known to Congress when the Judiciary and Process Acts were passed.

...
... Intention of Congress, in passing the Process Acts, was, that the forms of writs and executions, and the modes of process, and proceedings in common law suits, in the several Circuit Courts, should be the same as they were at that time in the courts of the respective States. Instead of framing the forms of process, and prescribing the modes of process, Congress adopted those already

413. 34 U.S. (9 Pet.) 632, 654–60 (1835).

414. *Id.* at 656 (citation omitted).

prepared and in use in the respective States, not as State regulations, but as the rules and regulations prescribed by Congress for use in the several Circuit Courts. Adopted as they were, by an act of Congress, they became the permanent forms and modes of proceeding, and continue in force wholly unaffected by any subsequent State legislation. Alterations can only be made by Congress, or by the Federal courts, acting under the authority of an act of Congress.⁴¹⁵

***Lamaster v. Keeler*, 123 U.S. 376 (1887).**

In *Lamaster v. Keeler*, the Court wrote:

The first process act of Congress, passed September 29, 1789, (1 Stat. 93, c. 21), provided “that, until further provision shall be made . . . the forms of writs and executions, except their style, and *modes of process*, . . . in the circuit and district courts, in suits at common law, shall be the same in each State, respectively, as are now used or allowed in the supreme courts of the same.”

....

Congress, which alone can determine the remedies which may be pursued for the enforcement of judgments in the Federal courts, as well as the procedure to be adopted in the progress of a suit, has declared its will with respect to both.⁴¹⁶

***Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).**

In *Sibbach v. Wilson & Co.*, the Court stated that “Congress has undoubted power to regulate the practice and procedure of federal courts.”⁴¹⁷

***Hanna v. Plumer*, 380 U.S. 460 (1965).**

In *Hanna v. Plumer*, the Court stated that “the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts.”⁴¹⁸

415. 73 U.S. (6 Wall.) 166, 190–91 (1867).

416. 123 U.S. 376, 389–390 (1887) (first two alterations in original).

417. 312 U.S. 1, 9 (1941).

418. 380 U.S. 460, 472 (1965).

***Mistretta v. United States*, 488 U.S. 361 (1989).**

In *Mistretta v. United States*, the Court stated that “rulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch.”⁴¹⁹ By the same reasoning, it would also become a judicial function only when delegated by the legislature to the judicial branch.

***Willy v. Coastal Corp.*, 503 U.S. 131 (1992).**

In *Willy v. Coastal Corp.*, the Court stated that “[f]rom almost the founding days of this country, it has been firmly established that Congress . . . may enact laws regulating the conduct of [the lower federal] courts.”⁴²⁰

419. 488 U.S. 361, 386 n.14 (1989).

420. 503 U.S. 131, 136 (1992).

**APPENDIX C: 5–4 SUPREME COURT DECISIONS STRIKING DOWN
FEDERAL, STATE, OR LOCAL STATUTES, OR STATE CONSTITUTIONAL
PROVISIONS, AS VIOLATING THE FEDERAL CONSTITUTION**

Year	Case	Federal (F), State (S), or Local (L) Statute	Subject	Subject Summary
1849	<i>Passenger Cases</i> , 48 U.S. (7 How.) 283	S	Collection by New York and Massachusetts of per capita taxes on alien and domestic passengers arriving in the ports of these states violated Congress's power to regulate foreign and interstate commerce pursuant to Article I, Section 8, Clause 3.	Interstate Commerce
1851	<i>Woodruff v. Trapnall</i> , 51 U.S. (10 How.) 190	S	A judgment debtor of the State of Arkansas tendered, in satisfaction of the judgment, banknotes in circulation at the time of the repeal by the state of that section of the said bank's charter providing that such notes should be received in discharge of public debts. Under the Contracts Clause, the legislative repeal could neither affect such notes nor abrogate the pledge of the state to receive them in payment of debts.	Contracts Clause
1867	<i>Ex parte Garland</i> , 71 U.S. (4 Wall.) 333	F	Requirement of a test oath (disavowing actions in hostility to the United States) before admission to appear as attorney in a federal court by virtue of any previous admission was held invalid as applied to an attorney who had been pardoned by the President for all offenses during the Rebellion as ex post facto, U.S. CONST. art. I, § 9, cl. 3, and an interference with the pardoning power, U.S. CONST. art. II, § 2, cl. 1.	Ex Post Facto and Pardon Power
1873	<i>State Tax on Foreign-Held Bonds</i> , 82 U.S. (15 Wall.) 300	S	A Pennsylvania law, insofar as it directed domestic corporations to withhold on behalf of the state a portion of interest due on bonds owned by nonresidents, impaired the obligation of contract and denied due process by taxing property beyond its jurisdiction.	Contracts Clause and Due Process
1883	<i>Kring v. Missouri</i> , 107 U.S. 221	S	A Missouri law that abolished a rule existing at the time the crime was committed, under which subsequent	Ex Post Facto

Year	Case	Federal (F), State (S), or Local (L) Statute	Subject	Subject Summary
			prosecution for first degree murder was precluded after a conviction for second degree murder has been set aside on appeal, was void as an ex post facto law.	
1885	<i>Virginia Coupon Cases</i> , 114 U.S. 269	S	A Virginia act that terminated a privilege accorded bondholders under prior law of tendering coupons from said bonds in payment of taxes impaired the obligation of contract. U.S. CONST. art. I, § 10.	Contracts Clause
1894	<i>Mobile & Ohio R.R. v. Tennessee</i> , 153 U.S. 486	S	Tennessee statutes that levied taxes on a railroad company enjoying tax exemption under an earlier charter impaired the obligation of contract.	Contracts Clause
1894	<i>Covington & Cincinnati Bridge Co. v. Kentucky</i> , 154 U.S. 204	S	A Kentucky act regulating toll rates on bridge across the Ohio River was an unconstitutional regulation of interstate commerce.	Interstate Commerce
1901	<i>Fairbank v. United States</i> , 181 U.S. 283	F	Stamp tax on foreign bills of lading, was held a tax on exports in violation of Article I, Section 9.	Taxes on Exports
1903	<i>The Robert W. Parsons</i> , 191 U.S. 17	S	New York statutes giving a lien for repairs upon vessels, and providing for the enforcement of such liens by proceedings in rem, were held void as in conflict with the exclusive admiralty and maritime jurisdiction of the federal courts.	Admiralty and Maritime Jurisdiction
1905	<i>Lochner v. New York</i> , 198 U.S. 45	S	A New York statute establishing a ten hour workday in bakeries violated due process because it interfered with the employees' freedom to contract in relation to their labor.	Due Process and Freedom of Contract
1907	<i>American Smelting Co. v. Colorado</i> , 204 U.S. 103	S	A Colorado statute stipulating that foreign corporations, as a condition for admission to do business, pay a fee based on their capital stock whereupon they would be subjected to all the liabilities and restrictions imposed upon domestic corporations amounted to a contract, the obligation of which was invalidly impaired by a later statute that imposed higher annual license fees on foreign corporations admitted under the preceding terms than were levied on domestic corporations, whose corporate existence had not expired.	Contracts Clause
1908	<i>The Employers' Liability Cases</i> , 207	F	Act providing that "every common carrier engaged in trade or commerce in the District of Columbia . . . or between the several States . . . shall be liable to	Interstate Commerce

Year	Case	Federal (F), State (S), or Local (L) Statute	Subject	Subject Summary
	U.S. 463		any of its employees . . . for all damages which may result from the negligence of any of its officers . . . or by reason of any defect . . . due to its negligence in its cars, engines . . . roadbed," <i>The Employers' Cases</i> , 207 U.S. at 490 n.1, was held not supportable under Article I, Section 8, Clause 3 because it extended to intrastate as well as interstate commercial activities.	
1908	<i>Galveston, Harrisburg & San Antonio Ry. v. Texas</i> , 210 U.S. 217	S	A Texas gross receipts tax insofar as it was levied on railroad receipts that included income derived from interstate commerce unconstitutionally burdened interstate commerce.	Interstate Commerce
1910	<i>W. Union Telephone Co. v. Kansas</i> , 216 U.S. 1	S	A Kansas statute imposing a charter fee, computed as a percentage of authorized capital stock, on corporations for the privilege of doing business in Kansas, could not validly be collected from a foreign corporation engaged in interstate commerce, and also violated due process insofar as it was imposed on property, part of which was located beyond the limits of that state.	Interstate Commerce and Due Process
1913	<i>City of Owensboro v. Cumberland Telephone & Telephone Co.</i> , 230 U.S. 58	L	An ordinance of a Kentucky municipality which required a telephone company to remove from the streets poles and wires installed under a prior ordinance granting permission to do so, without restriction as to the duration of such privilege, or, in the alternative, pay a rental not prescribed in the original ordinance impaired an obligation of contract contrary to Article I, Section 10.	Contracts Clause
1918	<i>Hammer v. Dagenhart</i> , 247 U.S. 251	F	The original Child Labor Law, providing "[t]hat no producer . . . shall ship . . . in interstate . . . commerce . . . any article or commodity the product of any mill . . . in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work . . . more than eight hours in any day, or more than six days in any week," <i>Hammer</i> , 247 U.S. at 268 n.1, was held not within the commerce power of Congress.	Commerce Clause

Year	Case	Federal (F), State (S), or Local (L) Statute	Subject	Subject Summary
1918	<i>N. Y. Life Insurance Co. v. Dodge</i> , 246 U.S. 357	S	Liberty of contract, as protected by the due process clause of the Fourteenth Amendment, precluded enforcement of the Missouri nonforfeiture statute, which prescribed how net value of a life insurance policy was to be applied to avert a forfeiture in the event the annual premium is not paid. The statute prevented a Missouri resident from executing in the New York office of the insurer a different agreement sanctioned by New York law whereby the policy was pledged as security for a loan and later canceled in satisfaction of the indebtedness.	Contracts Clause and Due Process
1920	<i>Eisner v. Macomber</i> , 252 U.S. 189	F	Provision of the income tax law of 1916, that a "stock dividend shall be considered income, to the amount of its cash value," <i>Eisner</i> , 252 U.S. at 200 n.1, was held invalid (in spite of the Sixteenth Amendment) as an attempt to tax something not actually income, without regard to apportionment under Article I, Section 2, Clause 3.	Taxation and Apportionment
1920	<i>Knickerbocker Ice Co. v. Stewart</i> , 253 U.S. 149	F	The amendment of §§ 24 and 256 of the Judicial Code (which prescribe jurisdiction of district courts) "sav[ing] to claimants the rights and remedies under the workmen's compensation law of any State," <i>Knickerbocker Ice Co.</i> , 253 U.S. at 156, was held an unconstitutional attempt to transfer federal legislative powers to the states. The Constitution, by Article III, Section 2, and Article I, Section 8, approved rules of general maritime law.	Federalism
1921	<i>Truax v. Corrigan</i> , 257 U.S. 312	S	An Arizona statute that regulated injunctions in labor disputes, which exempted ex-employees when committing tortious injury to the business of their former employer in the form of mass picketing, libelous utterances, and inducement of customers to withhold patronage, while leaving subject to injunctive restraint all other tortfeasors engaged in like wrongdoing, deprived the employer of property without due process and denied him equal protection of the law.	Due Process and Equal Protection
1923	<i>Pennsylvania v. West Virginia</i> , 262	S	A West Virginia law that required pipe line companies to fill all local needs before endeavoring to export any natural	Interstate Commerce

Year	Case	Federal (F), State (S), or Local (L) Statute	Subject	Subject Summary
	U.S. 553		gas extracted in West Virginia was void as a prohibited interference with interstate commerce.	
1927	<i>Tyson & Bro. v. Banton</i> , 273 U.S. 418	S	A New York law that prohibited ticket agencies from selling theatre tickets at prices in excess of fifty cents over the price printed on the ticket was void because it regulated a business not affected with the public interest and deprived such business of due process.	Due Process
1928	<i>Louisville Gas & Electric Co. v. Coleman</i> , 277 U.S. 32	S	A Kentucky law that conditioned the recording of mortgages not maturing within five years upon the payment of a tax of twenty cents for each \$100 of value secured, but that exempted mortgages maturing within that period, was void as denying equal protection of the laws.	Equal Protection
1928	<i>Long v. Rockwood</i> , 277 U.S. 142	S	A Massachusetts income tax law could not validly be imposed on income received by a citizen as royalties for the use of patents issued by the United States.	Patents and State Taxation
1928	<i>Panhandle Oil Co. v. Mississippi ex rel. Knox</i> , 277 U.S. 218	S	A Mississippi law imposing tax on the sale of gasoline was void as applied to sales to federal instrumentalities such as the Coast Guard or a Veterans' Hospital.	State Taxation of Sales to Federal Entities
1931	<i>Coolidge v. Long</i> , 282 U.S. 582	S	A Massachusetts law that imposed succession taxes on all property in Massachusetts transferred by deed or gift intended to take effect in possession or enjoyment after the death of the grantor, or transferred to any person absolutely or in trust, could not, consistent with due process or the Contracts Clause, be enforced with reference to rights of succession or rights effected by gift that vested under trust agreements created prior to passage of the act, notwithstanding that the settlor died after its passage.	Contracts Clause and Due Process
1931	<i>Near v. Minnesota ex rel. Olson</i> , 283 U.S. 697	S	A Minnesota law that authorized the enjoinder of one engaged regularly in the business of publishing a malicious, scandalous, and defamatory newspaper or magazine, as applied to publications charging neglect of duty and corruption	Freedom of the Press

Year	Case	Federal (F), State (S), or Local (L) Statute	Subject	Subject Summary
			on the part of state law enforcement officers, effected an unconstitutional infringement of freedom of the press as safeguarded by the Due Process Clause of the Fourteenth Amendment.	
1932	<i>Nixon v. Condon</i> , 286 U.S. 73	S	Texas White Primary Law that empowered the state executive committee of a political party to prescribe the qualifications of members of the party and thereby to exclude Negroes from voting in primaries conducted by the party amounted to state action in violation of the Equal Protection Clause of the Fourteenth Amendment.	Equal Protection
1935	<i>Perry v. United States</i> , 294 U.S. 330	F	Abrogation of gold clause in government obligations was held a repudiation of the pledge implicit in the power to borrow money under Article I, Section 8, Clause 2 and a violation of the Fourteenth Amendment.	Borrowing Power of Congress
1935	<i>R.R. Retirement Board v. Alton Railway</i> , 295 U.S. 330	F	The Railroad Retirement Act, establishing a detailed compulsory retirement system for employees of carriers subject to the Interstate Commerce Act, was held not to be a regulation of commerce within the meaning of Article I, Section 8, Clause 3 and a violation of the Due Process Clause (Fifth Amendment).	Interstate Commerce and Due Process
1936	<i>Ashton v. Cameron County Water Improvement District</i> , 298 U.S. 513	F	Provision for readjustment of municipal indebtedness, though "adequately related" to the bankruptcy power, was held invalid as an interference with state sovereignty.	State Sovereignty
1936	<i>Morehead v. New York ex rel. Tipaldo</i> , 298 U.S. 587	S	A New York law requiring employers to pay women minimum wages that would be equal to the fair and reasonable value of the services rendered and sufficient to meet the minimum cost of living necessary for health deprived employers and employees of their freedom of contract and thus violated due process of law.	Contracts Clause and Due Process
1937	<i>Herndon v. Lowry</i> , 301 U.S. 242	S	A Georgia insurrection statute, which criminalized the solicitation of members for a political party and conducting meetings of a local unit of that party if one of the doctrines of the party may be said to embrace ultimate resort in the	Freedom of Speech

Year	Case	Federal (F), State (S), or Local (L) Statute	Subject	Subject Summary
			indefinite future to violence against government, invaded freedom of speech as guaranteed by the Due Process Clause of the Fourteenth Amendment.	
1937	<i>Hartford Steam Boiler Inspection & Insurance Co. v. Harrison</i> , 301 U.S. 459	S	A Georgia law that prohibited stock insurance companies writing fire and casualty insurance from acting through agents who were their salaried employees, but that permitted mutual companies writing such insurance to do so, violated the Equal Protection Clause of the Fourteenth Amendment.	Equal Protection
1943	<i>Jones v. City of Opelika</i> , 319 U.S. 103	L	An Opelika, Alabama, ordinance imposing licenses and taxes on various businesses cannot constitutionally be applied to the business of selling books and pamphlets on the streets or from house to house. As applied, the ordinance infringes liberties of speech and press and religion guaranteed by the Due Process Clause of the Fourteenth Amendment.	Freedom of Speech, Press, and Religion
1943	<i>Murdock v. Pennsylvania</i> , 319 U.S. 105	L	An ordinance of the City of Jeanette providing that all persons soliciting orders for merchandise of any kind, or persons delivering such articles under such orders, must procure a license and pay a fee, violates the First and Fourteenth Amendments when applied to persons soliciting orders for religious books and pamphlets, because "[a] state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." <i>Murdock</i> , 319 U.S. at 113.	Freedom of Speech
1944	<i>McLeod v. Dilworth Co.</i> , 322 U.S. 327	S	The Commerce Clause prohibits the imposition of an Arkansas sales tax on sales to residents of the state that are consummated by acceptance of orders in, and the shipments of goods from, another state, in which title passes upon delivery to the carrier.	Interstate Commerce
1945	<i>Thomas v. Collins</i> , 323 U.S. 516	S	A Texas statute required union organizers, before soliciting members, to obtain an organizer's card from the Secretary of State. As applied in this case, the statute violates the First and Fourteenth Amendments because it	Freedom of Speech and Assembly

Year	Case	Federal (F), State (S), or Local (L) Statute	Subject	Subject Summary
			imposes a prior restraint on free speech and free assembly. The First Amendment's safeguards apply to business and economic activity, and restrictions of these activities can be justified only by clear and present danger to the public welfare.	
1947	<i>Order of United Commercial Travelers of America v. Wolfe</i> , 331 U.S. 586	S	A South Dakota Law setting a six-year statute of limitations for commencing actions on contract and declaring void every stipulation in a contract that reduces the time during which a party may sue to enforce his rights cannot be applied to an action brought in South Dakota for benefits arising under the constitution of a fraternal benefit society incorporated in Ohio and licensed to do business in South Dakota. The claimant is bound by the limitation prescribed in the society's constitution barring actions on claims six months after disallowance by the society, and South Dakota is required under the Federal Constitution to give full faith and credit to the public acts of Ohio.	Full Faith and Credit
1948	<i>Saia v. New York</i> , 334 U.S. 558	L	A Lockport ordinance forbidding use of sound amplification excepted public dissemination, through loudspeakers, of news, matters of public concern, and athletic activities, provided that the latter be done under permission obtained from the Chief of Police. The ordinance is unconstitutional on its face as a prior restraint on speech, in violation of the First Amendment, made applicable to the states by the Fourteenth Amendment. No standards were prescribed for the exercise of discretion by the Chief of Police.	Freedom of Speech
1949	<i>Terminiello v. City of Chicago</i> , 337 U.S. 1	L	A Chicago ordinance proscribed the making of improper noises or other conduct contributing to a breach of the peace. Petitioner was convicted of violating said ordinance by reason of the fact that he had addressed a large audience in an auditorium where he had vigorously criticized various political and racial groups as well as the disturbances produced by an angry and turbulent crowd protesting his appearance. At trial, the judge instructed the jury that any behavior that stirs the	Freedom of Speech

Year	Case	Federal (F), State (S), or Local (L) Statute	Subject	Subject Summary
			public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, violates the ordinance. As construed and applied by the trial court, the ordinance violates the right of free speech guaranteed by the First Amendment and made applicable to the states by the Fourteenth Amendment.	
1949	<i>H. P. Hood & Sons v. Du Mond</i> , 336 U.S. 525	S	Denial of a license under the New York Agricultural and Market Law violated the Commerce Clause and the Federal Agricultural Marketing Act where the denial was on the ground that the expanded facilities would reduce the supply of milk for local markets and result in destructive competition in a market already adequately served.	Interstate Commerce
1951	<i>Hughes v. Fetter</i> , 341 U.S. 609	S	The Wisconsin wrongful death statute, authorizing recovery "only for deaths caused in that State," <i>Hughes</i> , 341 U.S. at 610, and thereby blocking recovery under statutes of other states, must give way to the strong unifying principle embodied in the Full Faith and Credit Clause which looks toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states.	Full Faith and Credit
1954	<i>Miller Bros. v. Maryland</i> , 347 U.S. 340	S	Where residents of nearby Maryland made purchases from appellant in Delaware, some deliveries being made in Maryland by common carrier and some by appellant's truck, seizure of the appellant's truck in Maryland and holding it liable for the Maryland use tax on all goods sold in Delaware to Maryland customers is a denial of due process. The Delaware corporation has not subjected itself to the taxing power of Maryland and has not afforded Maryland jurisdiction or power to impose upon it a liability for collections of the Maryland use tax.	Due Process
1954	<i>Railway Express Agency v. Virginia</i> , 347 U.S. 359	S	In addition to "taxes on property of express companies," Virginia provided that "for the privilege of doing business in this State," express companies shall pay an "annual license tax" upon gross	Interstate Commerce

Year	Case	Federal (F), State (S), or Local (L) Statute	Subject	Subject Summary
			receipts earned in the state "on business passing through, into or out of this State." <i>Ry. Express Agency</i> , 347 U.S. at 362. The gross-receipts tax is in fact and effect a privilege tax, and its application to a foreign corporation doing an exclusively interstate business violated the Commerce Clause.	
1956	<i>Slochower v. Board of Education</i> , 350 U.S. 551	L	Section 903 of the New York City Charter provides that whenever a city employee invokes the privilege against self-incrimination to avoid answering inquiries into his official conduct by a legislative committee, his employment shall terminate. The summary dismissal thereunder, without notice and hearing, of a teacher at City College who was entitled to tenure and could be discharged only for cause and after notice, hearing and appeal, violated the Due Process Clause of the Fourteenth Amendment. Invocation of the privilege to justify refusal to answer questions of a congressional committee concerning membership in the Communist Party in 1948–1949 cannot be viewed as the equivalent either to a confession of guilt or a conclusive presumption of perjury.	Due Process
1956	<i>Griffin v. Illinois</i> , 351 U.S. 12	S	Illinois statutes provide that a writ of error may be prosecuted on a "mandatory record" kept by the court clerk and consisting of the indictment, arraignment, plea, verdict, and sentence. The mandatory record can be obtained free of charge by an indigent defendant. In such instances review is limited to errors on the face of the mandatory record, and there is no review of trial errors such as an erroneous ruling on admission of evidence. No provision was made whereby a convicted person in a non-capital case could obtain a bill of exceptions or report of the trial proceedings. Petitioner was held to have been denied due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment.	Due Process and Equal Protection
1957	<i>Lambert v. California</i> , 355 U.S. 225	L	Los Angeles Municipal Code made it unlawful for a person who has been convicted of a crime punishable in California as a felony to remain in the city longer than five days without	Due Process

Year	Case	Federal (F), State (S), or Local (L) Statute	Subject	Subject Summary
			registering with the Chief of Police. Applied to a person who is not shown to have had actual knowledge of his duty to register, this ordinance violates the Due Process Clause of the Fourteenth Amendment of the Constitution.	
1958	<i>Trop v. Dulles</i> , 356 U.S. 86	F	A provision of the Aliens and Nationality Code, 8 U.S.C. § 1481(a)(8), derived from the Nationality Act of 1940, as amended, that citizenship shall be lost upon conviction by court martial and dishonorable discharge for deserting the armed services in time of war, was held invalid as imposing a cruel and unusual punishment barred by the Eighth Amendment and not authorized by the war powers conferred by Article I, Section 8, Clauses 11 to 14.	Cruel and Unusual Punishment
1960	<i>Shelton v. Tucker</i> , 364 U.S. 479	S	An Arkansas statute requiring every school teacher, as a condition of employment in state-supported schools and colleges, to file an affidavit listing every organization to which he had belonged or contributed within the preceding five years deprived teachers of associational freedom guaranteed by the Due Process Clause of the Fourteenth Amendment.	Freedom of Association
1963	<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144	F	Section 401(J) of Immigration and Nationality Act of 1940 (added in 1944) and § 49(a)(10) of the Immigration and Nationality Act of 1952, which deprive an American of citizenship, without the procedural safeguards guaranteed by the Fifth and Sixth Amendments, for leaving or remaining outside the country, in time of war or national emergency in order to evade military service, was held unconstitutional.	Self-incrimination and Right to Counsel
1963	<i>NAACP v. Button</i> , 371 U.S. 415	S	A Virginia law, which (1) expanded malpractice by attorneys to include acceptance of employment or compensation from any person or organization not a party to a judicial proceeding and having no pecuniary right or liability in it, and (2) made it an offense for such person or organization to solicit business for an attorney,	Freedom of Speech and Association

Year	Case	Federal (F), State (S), or Local (L) Statute	Subject	Subject Summary
			violated freedom of expression and association, as guaranteed by the Due Process Clause of the Fourteenth Amendment when enforced against a corporation, including its attorneys and litigants, whose major purpose is the elimination of racial segregation through litigation that it solicits, institutes, and finances.	
1965	<i>United States v. Brown</i> , 381 U.S. 437	F	A provision of the Labor-Management Reporting and Disclosure Act of 1959, making it a crime for a member of the Communist Party to serve as an officer or, with the exception of clerical or custodial positions, as an employee of a labor union, was held to be unconstitutional as a bill of attainder.	Bill of Attainder
1966	<i>Elfbrandt v. Russell</i> , 384 U.S. 11	S	An Arizona loyalty oath is unconstitutionally overbroad and inclusive.	Loyalty Oaths and Overbreadth
1967	<i>Afroyim v. Rusk</i> , 387 U.S. 253	F	A provision of the Immigration and Nationality Act of 1952, providing for revocation of United States citizenship of one who votes in a foreign election, was held unconstitutional under Section 1 of the Fourteenth Amendment.	Citizenship
1967	<i>Keyishian v. Board of Regents</i> , 385 U.S. 589	S	A New York statute, requiring removal of teachers for "treasonable or seditious" utterances or acts, was held unconstitutionally vague because it apparently bans mere advocacy of an abstract doctrine, and unconstitutionally broad in that it makes Communist Party membership prima facie evidence of disqualification for teaching in public schools.	Free Speech and Vagueness
1967	<i>Reitman v. Mulkey</i> , 387 U.S. 369	S	A provision of the California Constitution, adopted by a referendum that repealed "open housing" laws and prohibited state abridgement of a realty owner's right to sell and lease, or to refuse to sell and lease, as he pleases, was held to violate the Equal Protection Clause.	Equal Protection
1970	<i>Oregon v. Mitchell</i> , 400 U.S. 112	F	A provision of the Voting Rights Act Amendments of 1970 that set a minimum voting age qualification of eighteen in state and local elections was held unconstitutional because it was beyond the powers of Congress to legislate.	Congress's Legislative Power
1971	<i>United States</i>	F	Tax laws providing for the forfeiture of	Self-

Year	Case	Federal (F), State (S), or Local (L) Statute	Subject	Subject Summary
	<i>v. U.S. Coin & Currency</i> , 401 U.S. 715		property used in violating internal revenue laws may not be constitutionally used in face of invocation of privilege against self-incrimination to condemn money in the possession of a gambler who had failed to comply with the registration and reporting scheme held void in <i>Marchetti v. United States</i> , 390 U.S. 39 (1968).	incrimination
1972	<i>Furman v. Georgia</i> , 408 U.S. 238	S	Statutory imposition of capital punishment upon criminal conviction either at discretion of jury or of the trial judge may not be carried out. In the view of two Justices, Georgia's statute was unconstitutional because the death penalty is per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, while in the view of three Justices, the statute was unconstitutional as applied because of the discriminatory or arbitrary manner in which death was imposed upon convicted defendants in violation of the Eighth and Fourteenth Amendments.	Cruel and Unusual Punishment
1973	<i>U.S. Department of Agricultural v. Murry</i> , 413 U.S. 508	F	A provision of the Food Stamp Act, disqualifying from participation in program any household containing a person eighteen years or older who had been claimed as a dependent child for income tax purposes in the present or preceding tax year by a taxpayer not a member of the household, was held to violate the Due Process Clause of the Fifth Amendment.	Due Process
1975	<i>Goss v. Lopez</i> , 419 U.S. 565	S	An Ohio statute authorizing suspension without a hearing of public school students for up to ten days for misconduct denied students procedural due process in violation of the Fourteenth Amendment.	Due Process
1976	<i>National League of Cities v. Usery</i> , 426 U.S. 833 (subsequently overruled)	F	Sections of the Fair Labor Standards Act that extended wage and hour coverage to the employees of state and local governments were held invalid because Congress lacks the authority under the Commerce Clause to regulate employee activities in areas of traditional governmental functions of the states.	Interstate Commerce and Traditional Governmental Functions of States

Year	Case	Federal (F), State (S), or Local (L) Statute	Subject	Subject Summary
1976	<i>Woodson v. North Carolina</i> , 428 U.S. 280	S	A North Carolina statute making the death penalty mandatory upon conviction of first-degree murder violated the Eighth Amendment, because determination to impose death must be individualized.	Cruel and Unusual Punishment
1977	<i>Califano v. Goldfarb</i> , 430 U.S. 199	F	Social Security Act provision awarding survivor's benefits based on earnings of a deceased wife to widower only if he was receiving at least half of his support from her at the time of her death, whereas widow receives benefits regardless of dependency, was held to violate equal protection element of the Fifth Amendment's Due Process Clause because of its impermissible sex classification.	Equal Protection and Sex Classifications
1977	<i>Moore v. City of East Cleveland</i> , 431 U.S. 494	L	An East Cleveland zoning ordinance, which limited housing occupancy to members of single family and restrictively defined family so as to prevent an extended family (i.e., two grandchildren by different children residing with grandmother) from living together, violated the Due Process Clause.	Due Process
1977	<i>Trimble v. Gordon</i> , 430 U.S. 762	S	An Illinois law allowing illegitimate children to inherit by intestate succession only from their mothers while legitimate children may take from both parents denied illegitimates the equal protection of the laws.	Equal Protection
1977	<i>Roberts v. Louisiana</i> , 431 U.S. 633	S	A Louisiana statute imposing a mandatory death sentence upon one convicted of first-degree murder of police officer engaged in performance of his duties violated the Eighth Amendment.	Cruel and Unusual Punishment
1977	<i>Nyquist v. Mauclet</i> , 432 U.S. 1	S	A New York statute barring from access to state financial assistance for higher education aliens who have not either applied for citizenship or affirmed the intent to apply when they qualify violated the Equal Protection Clause.	Equal Protection
1977	<i>Wolman v. Walter</i> , 433 U.S. 229, overruled by <i>Mitchell v. Helms</i> , 530 U.S. 793	S	Ohio's loan of instructional material and equipment to nonpublic religious schools and transportation and services for field trips for nonpublic school pupils violated the First Amendment religion clauses.	Establishment Clause

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	(2000).			
1978	<i>First National Bank v. Bellotti</i> , 435 U.S. 765	S	A Massachusetts criminal statute that banned banks and business corporations from making expenditures to influence referendum votes on any questions not affecting the property, business, or assets of the corporation violated the First Amendment.	Freedom of Speech
1979	<i>Caban v. Mohammed</i> , 441 U.S. 380	S	A New York law permitting an unwed mother but not an unwed father to block the adoption of their child by withholding consent is an impermissible gender distinction violating the Equal Protection Clause of the Fourteenth Amendment.	Equal Protection and Gender Distinctions
1980	<i>Vitek v. Jones</i> , 445 U.S. 480	S	A Nebraska statute, which authorized authorities to summarily transfer a prison inmate from jail to another institution if a physician finds that he suffers from a mental disease or defect and cannot be given proper treatment in jail, violated the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment unless the transfer is accompanied by adequate procedural protections.	Due Process
1980	<i>Stone v. Graham</i> , 449 U.S. 39	S	A Kentucky statute requiring a copy of Ten Commandments, purchased with private contributions, to be posted on the wall of each public classroom in the state violated the Establishment Clause of the First Amendment.	Establishment Clause
1982	<i>Santosky v. Kramer</i> , 455 U.S. 745	S	A New York law authorizing termination of parental rights upon proof by only a fair preponderance of the evidence violates the Due Process Clause of the Fourteenth Amendment.	Due Process
1982	<i>Plyler v. Doe</i> , 457 U.S. 202	S	A Texas statute withholding state funds from local school districts for the education of any children not legally admitted into United States and authorizing boards to deny enrollment to such children denied equal protection of the laws.	Equal Protection
1982	<i>Washington v. Seattle School Dist.</i> , 458 U.S. 457	S	A Washington statute, enacted by initiative vote of the electorate, barring school boards from busing students for racially integrative purposes, denied	Equal Protection

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			equal protection of the laws.	
1982	<i>Enmund v. Florida</i> , 458 U.S. 782	S	Florida's felony-murder statute, authorizing the death penalty solely for participation in a robbery in which another robber kills someone, violated the Eighth Amendment.	Cruel and Unusual Punishment
1983	<i>Anderson v. Celebrezze</i> , 460 U.S. 780	S	An Ohio statute requiring independent candidates for President and Vice-President to file nominating petitions by March 20 in order to qualify for the November ballot was held unconstitutional as substantially burdening the associational rights of the candidates and their supporters.	Freedom of Association
1983	<i>Karcher v. Daggett</i> , 462 U.S. 725	S	New Jersey's congressional districting statute, creating districts in which the deviation between largest and smallest districts was 0.7%, or 3,674 persons, violated Article I, Section 2's "equal representation" requirement because it failed to result from a good-faith effort to achieve population equality.	Equal Representation
1984	<i>FCC v. League of Women Voters</i> , 468 U.S. 364	F	Communications Act provision banning noncommercial educational stations receiving grants from the Corporation for Public Broadcasting from engaging in editorializing violated the First Amendment.	Freedom of Speech
1984	<i>Secretary of State of Maryland v. Joseph H. Munson Co.</i> , 467 U.S. 947	S	Maryland's prohibition on charitable organizations paying more than 25% of solicited funds for expenses of fundraising violated the Fourteenth Amendment by creating an unnecessary risk of chilling protected First Amendment activity.	Freedom of Speech
1985	<i>Metro. Life Insurance Co. v. Ward</i> , 470 U.S. 869	S	Alabama's domestic preference tax, imposing a substantially lower gross premiums tax rate on domestic insurance companies than on out-of-state insurance companies, violated the Equal Protection Clause.	Equal Protection
1986	<i>FEC v. Massachusetts Citizens for Life, Inc.</i> , 479 U.S. 238	F	A provision of the Federal Election Campaign Act requiring that independent corporate campaign expenditures be financed by voluntary contributions to a separate segregated fund violated the First Amendment as applied to a corporation organized to promote political ideas, having no stockholders, and not serving as a front for a business corporation or union.	Freedom of Speech

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1986	<i>Philadelphia Newspapers v. Hepps</i> , 475 U.S. 767	S	A Pennsylvania statute incorporating the common-law rule that defamatory statements are presumptively false violated the First Amendment as applied to a libel action brought by a private figure against a media defendant; instead, the plaintiff must bear the burden of establishing falsity.	Freedom of Speech
1986	<i>Thornburgh v. American College of Obstetricians and Gynecologists</i> , 476 U.S. 747, overruled in part by <i>Planned Parenthood v. Casey</i> , 505 U.S. 833 (1992).	S	A Pennsylvania statute prescribing a variety of requirements for performance of an abortion, including informed consent, reporting of various information concerning the mother's history and condition, and standard-of-care and second-physician requirements after viability, unconstitutionally violated a woman's right to have an abortion under <i>Roe v. Wade</i> .	Abortion
1986	<i>Tashjian v. Republican Party of Connecticut</i> , 479 U.S. 208	S	A Connecticut statute imposing a "closed primary" election under which persons not registered with a political party may not vote in its primaries violated the First and Fourteenth Amendments by preventing political parties from entering into political association with individuals of their own choosing.	Freedom of Association
1987	<i>Booth v. Maryland</i> , 482 U.S. 496, overruled by <i>Payne v. Tennessee</i> , 501 U.S. 808 (1991).	S	A Maryland statute requiring preparation of a "victim impact statement" describing the effect of a crime on a victim and his family violated the Eighth Amendment to the extent that it required introduction of the statement at the sentencing phase of a capital murder trial.	Excessive Punishment
1987	<i>American Trucking Ass'n v. Scheiner</i> , 483 U.S. 266	S	Pennsylvania statutes imposing lump-sum annual taxes on operation of trucks on state's roads violated the Commerce Clause as discriminating against interstate commerce.	Interstate Commerce
1989	<i>Texas v. Johnson</i> , 491 U.S. 397	S	Texas' flag desecration statute, prohibiting any physical mistreatment of the American flag that the actor knows would seriously offend other persons, violated the First Amendment as applied	Freedom of Speech

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			to an individual who burned an American flag as part of a political protest.	
1990	<i>United States v. Eichman</i> , 496 U.S. 310	F	The Flag Protection Act of 1989, criminalizing burning and certain other forms of destruction of the United States flag, violated the First Amendment. Most of the prohibited acts involve disrespectful treatment of the flag, and evidence a purpose to suppress expression out of concern for its likely communicative impact.	Freedom of Speech
1990	<i>Peel v. Attorney Registration & Disciplinary Commission of Illinois</i> , 496 U.S. 91	S	An Illinois rule of professional responsibility violated the First Amendment by completely prohibiting an attorney from holding himself out as a civil trial specialist certified by the National Board of Trial Advocacy.	Freedom of Speech
1990	<i>Hodgson v. Minnesota</i> , 497 U.S. 417	S	Minnesota's requirement that a woman under eighteen notify both her parents before having an abortion was held invalid as a denial of due process because it "does not reasonably further any legitimate state interest." <i>Hodgson</i> , 497 U.S. at 450. However, an alternative judicial bypass system saved the statute as a whole.	Abortion
1992	<i>Lee v. Weisman</i> , 505 U.S. 577	L	Providence, Rhode Island's use of members of the clergy to offer prayers at official public secondary school graduation ceremonies violated the First Amendment's Establishment Clause. The involvement of public school officials with religious activity was "pervasive," to the point of creating a state-sponsored and state-directed religious exercise in a public school; officials not only determined that an invocation and benediction should be given, but also selected the religious participant and provided him with guidelines for the content of nonsectarian prayers.	Establishment Clause
1992	<i>Lee v. International Society for Krishna Consciousness</i> , 505 U.S. 830	L	A regulation of the Port Authority of New York and New Jersey banning the sale or distribution of printed or written material to passers-by within the airport terminals operated by the facility violated the First Amendment.	Freedom of Speech

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1992	<i>Foucha v. Louisiana</i> , 504 U.S. 71	S	A Louisiana statute allowing an insanity acquittee no longer suffering from mental illness to be confined indefinitely in a mental institution until he is able to demonstrate that he is not dangerous to himself or to others violated due process.	Due Process
1994	<i>Department of Revenue of Montana v. Kurth Ranch</i> , 511 U.S. 767	S	Montana's tax on the possession of illegal drugs, to be "collected only after any state or federal fines or forfeitures have been satisfied," <i>Kurth</i> , 511 U.S. at 770, constituted punishment and thus violated the prohibition, derived from the Double Jeopardy Clause, against successive punishments for the same offense.	Double Jeopardy
1995	<i>U. S. Term Limits, Inc. v. Thornton</i> , 514 U.S. 779	S	An amendment to the Arkansas Constitution denying ballot access to congressional candidates who have already served three terms in the House of Representatives or two terms in the Senate was held invalid as conflicting with the qualifications for office set forth in Article I, Section 2, Clause 2 and Article I, Section 3, Clause 3 (specifying age, duration of U.S. citizenship, and state inhabitancy requirements). Article I sets the exclusive qualifications for a United States Representative or Senator.	Qualifications for Federal Office
1995	<i>Miller v. Johnson</i> , 515 U.S. 900	S	Georgia's congressional districting plan violated the Equal Protection Clause. The district court's finding that race was the predominant factor in drawing the boundaries of the Eleventh District was not clearly erroneous. The state did not meet its burden under strict scrutiny review to demonstrate that its districting was narrowly tailored to achieve a compelling interest.	Equal Protection
1995	<i>United States v. Lopez</i> , 514 U.S. 549	F	The Gun Free School Zones Act of 1990, which made it a criminal offense to knowingly possess a firearm within a school zone, exceeded congressional power under the Commerce Clause. It was "a criminal statute that by its terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise." <i>Lopez</i> , 514 U.S. at 561. Possession of a gun at or near a school "is in no sense an	Interstate Commerce

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			economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” <i>Id.</i> at 567.	
1996	<i>Denver Area Education Telecommunications Consortium v. FCC</i> , 518 U.S. 727	F	Section 10(b) of the Cable Television Consumer Protection and Competition Act of 1992, which required cable operators to segregate and block indecent programming on leased access channels if they do not prohibit it, violated the First Amendment. Section 10(c) of the Act, which permits a cable operator to prevent transmission of “sexually explicit” programming on public access channels, also violated the First Amendment.	Freedom of Speech
1996	<i>Shaw v. Hunt</i> , 517 U.S. 899	S	North Carolina’s congressional districting law, containing the racially gerrymandered Congressional District 12 as well as another majority-black district, violated the Equal Protection Clause because, under strict scrutiny applicable to racial classifications, creation of District 12 was not narrowly tailored to serve a compelling state interest. Creation of District 12 was not necessary to comply with either section 2 or section 5 of the Voting Rights Act, and the lower court found that the redistricting plan was not actually aimed at ameliorating past discrimination.	Equal Protection
1996	<i>Bush v. Vera</i> , 517 U.S. 952	S	Three congressional districts created by Texas law constituted unconstitutional racial gerrymandering under the Equal Protection Clause. The district court correctly held that race predominated over legitimate districting considerations, including incumbency, and consequently strict scrutiny applied. None of the three districts was narrowly tailored to serve a compelling state interest.	Equal Protection
1996	<i>Seminole Tribe of Florida v. Florida</i> , 517 U.S. 44	F	A provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a State in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact violated the Eleventh Amendment. In exercise of its powers under Article I, Congress may not abrogate States’ Eleventh Amendment immunity from suit in federal court. <i>Pennsylvania v. Union Gas</i>	Eleventh Amendment and State Immunity from Suit

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			<i>Co.</i> , 491 U.S. 1 (1989), is overruled.	
1997	<i>Printz v. United States</i> , 521 U.S. 898	F	Interim provisions of the Brady Handgun Violence Prevention Act that required state and local law enforcement officers to conduct background checks on prospective handgun purchasers were inconsistent with the Constitution's allocation of power between Federal and state governments. In <i>New York v. United States</i> , 505 U.S. 144 (1992), the Court held that Congress may not compel states to enact or enforce a federal regulatory program, and "Congress cannot circumvent that prohibition by conscripting the States' officers directly." <i>Printz</i> , 521 U.S. at 935.	Prohibition of Congress Commandeering State Resources
1997	<i>Camps Newfound/Owatonna v. Town of Harrison</i> , 520 U.S. 564	S	Maine's property tax law, which contained an exemption for charitable institutions but limited that exemption to institutions serving principally Maine residents, was held a form of protectionism that violated the "dormant" Commerce Clause as applied to deny exemption status to a nonprofit corporation that operated a summer camp for children, most of whom were not Maine residents.	Dormant Commerce Clause
1998	<i>Eastern Enterprises v. Apfel</i> , 524 U.S. 498	F	The Coal Industry Retiree Health Benefit Act of 1992 was held unconstitutional as applied to the petitioner Eastern Enterprises. Pursuant to the Act, the Social Security Commissioner imposed liability on Eastern for funding health care benefits of retirees from the coal industry who had worked for Eastern prior to 1966. Eastern had transferred its coal-related business to a subsidiary in 1965. Four Justices viewed the imposition of liability on Eastern as a violation of the Takings Clause, and one Justice viewed it as a violation of substantive due process.	Takings Clause and Substantive Due Process
1998	<i>United States v.ajakajian</i> , 524 U.S. 321	F	Statute requiring full civil forfeiture of money transported out of the United States without amounts in excess of \$10,000 being reported violated the Excessive Fines Clause of the Eighth	Excessive Fines

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			Amendment when \$357,144 was required to be forfeited.	
1999	<i>College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board</i> , 527 U.S. 666	F	The Trademark Remedy Clarification Act, which provided that states shall not be immune from suit under the Trademark Act of 1946 (Lanham Act) "under the eleventh amendment . . . or under any other doctrine of sovereign immunity," <i>Coll. Sav. Bank</i> , 527 U.S. at 670, did not validly abrogate state sovereign immunity. Congress lacks power to do so in exercise of Article I powers, and the TRCA cannot be justified as an exercise of power under Section 5 of the Fourteenth Amendment. The right to be free from a business competitor's false advertising is not a "property right" protected by the Due Process Clause.	State Sovereign Immunity and Enforcement Power under the Fourteenth Amendment
1999	<i>Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank</i> , 527 U.S. 627	F	The Patent and Plant Variety Remedy Clarification Act, which amended the patent laws to expressly abrogate states' sovereign immunity from patent infringement suits, was held invalid. Congress lacks power to abrogate state immunity in exercise of Article I powers, and the Patent Remedy Clarification Act cannot be justified as an exercise of power under Section 5 of the Fourteenth Amendment. Section 5 power is remedial, yet the legislative record reveals no identified pattern of patent infringement by states and the Act's provisions are "out of proportion to a supposed remedial or preventive object." <i>Fla. Prepaid</i> , 527 U.S. at 639.	State Sovereign Immunity and Enforcement Power under the Fourteenth Amendment
1999	<i>Alden v. Maine</i> , 527 U.S. 706	F	Fair Labor Standards Amendments of 1974 subjecting non-consenting states to suits for damages brought by employees in state courts violated the principle of sovereign immunity implicit in the constitutional scheme. Congress lacks power under Article I to subject non-consenting states to suits for damages in state courts.	State Sovereign Immunity
2000	<i>United States v. Playboy Entertainment Group, Inc.</i> , 529 U.S. 803	F	Section 505 of the Telecommunications Act of 1996, which required cable TV operators that offer channels primarily devoted to sexually oriented programming to prevent signal bleed either by fully scrambling those channels or by limiting their transmission to	Freedom of Speech

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			designated hours when children are less likely to be watching, violated the First Amendment. The provision is content-based, and therefore, could only be upheld if narrowly tailored to promote a compelling governmental interest. The measure was not narrowly tailored, as the government did not establish that the less restrictive alternative found in section 504 of the Act—that of scrambling a channel at a subscriber's request—would be ineffective.	
2000	<i>United States v. Morrison</i> , 529 U.S. 598	F	A provision of the Violence Against Women Act that created a federal civil remedy for victims of gender-motivated violence exceeded congressional power under the Commerce Clause and under Section 5 of the Fourteenth Amendment. The commerce power does not authorize Congress to regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." <i>Morrison</i> , 529 U.S. at 617. The Fourteenth Amendment prohibits only state action, and affords no protection against purely private conduct. Section 13981, however, was aimed at private conduct, not the conduct of state officials.	Interstate Commerce
2000	<i>Kimel v. Florida Board of Regents</i> , 528 U.S. 62	F	The Fair Labor Standards Act Amendments of 1974, amending the Age Discrimination in Employment Act to subject states to damages actions in federal courts, exceeded congressional power under Section 5 of the Fourteenth Amendment. Age is not a suspect classification under the Equal Protection Clause, and the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." <i>Kimel</i> , 528 U.S. at 82 (quoting <i>City of Boerne v. Flores</i> , 521 U.S. 507, 532 (1997)).	Congress's Enforcement Authority under Section 5 of the Fourteenth Amendment
2000	<i>Carmell v. Texas</i> , 529 U.S. 513	S	A Texas law that eliminated a requirement that the testimony of a sexual assault victim age fourteen years	Ex Post Facto

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			or older must be corroborated by two other witnesses violated the Ex Post Facto Clause of Article I, Section 10 as applied to a crime committed while the earlier law was in effect. So applied, the law fell into the category of an ex post facto law that requires less evidence in order to convict. Under the old law, the petitioner could have been convicted only if the victim's testimony had been corroborated by two witnesses, while under the amended law the petitioner was convicted on the victim's testimony alone.	
2000	<i>Apprendi v. New Jersey</i> , 530 U.S. 466	S	A New Jersey "hate crime" statute, which allowed a judge to extend a sentence upon finding by a preponderance of the evidence that the defendant, in committing a crime for which he has been found guilty, acted with a purpose to intimidate because of race, violated the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's requirements of speedy and public trial by an impartial jury. Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and established beyond a reasonable doubt.	Due Process and Speedy and Public Trial by an Impartial Jury
2000	<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640	S	Application of New Jersey's public accommodations law to require the Boy Scouts of America to admit an avowed homosexual as a member and assistant scout master violated the organization's First Amendment associational rights. The general mission of the Scouts, to instill values in young people, is expressive activity entitled to First Amendment protection, and requiring the Scouts to admit a gay scout leader would contravene the Scouts' asserted policy disfavoring homosexual conduct.	Freedom of Association
2000	<i>Stenberg v. Carhart</i> , 530 U.S. 914	S	Nebraska's statute criminalizing the performance of "partial birth abortions" was held unconstitutional under principles set forth in <i>Roe v. Wade</i> and <i>Planned Parenthood v. Casey</i> . The statute lacked an exception for instances in which the banned procedure was necessary to preserve the health of the mother, and, because it applied to the	Abortion

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			commonplace dilation and evacuation procedure as well as to the dilation and extraction method, imposed an "undue burden" on a woman's right to an abortion.	
2001	<i>Legal Services Corp. v. Velazquez</i> , 531 U.S. 533	F	A restriction in the appropriations act for the Legal Services Corporation (LSC) that prohibited funding for any organization that participates in litigation that challenges a federal or state welfare law constituted viewpoint discrimination in violation of the First Amendment. Moreover, the restrictions on LSC advocacy "distort [the] usual functioning" of the judiciary, and are "inconsistent with accepted separation-of-powers principles." <i>Velazquez</i> , 531 U.S. at 543, 546. "An informed, independent judiciary presumes an informed, independent bar," yet the restriction "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." <i>Velazquez</i> , 531 U.S. at 545.	Freedom of Speech and Separation of Powers
2001	<i>Board of Trustees of University of Alabama v. Garrett</i> , 531 U.S. 356	F	Title I of the Americans with Disabilities Act of 1990 (ADA) exceeded congressional power to enforce the Fourteenth Amendment, and violated the Eleventh Amendment by subjecting states to suits brought by state employees in federal courts to collect money damages for the state's failure to make reasonable accommodations for qualified individuals with disabilities. Rational basis review applied, and consequently states "are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational." <i>Garrett</i> , 531 U.S. at 367. The legislative record of the ADA fails to show that Congress identified a pattern of irrational state employment discrimination against the disabled. Moreover, even if a pattern of discrimination by states had been found, the ADA's remedies would run afoul of	Congress's Enforcement Authority under the Fourteenth Amendment

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			the “congruence and proportionality” limitation on Congress’s exercise of enforcement power. <i>Id.</i> at 372.	
2001	<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525	S	Massachusetts’s restrictions on outdoor advertising and point-of-sale advertising of smokeless tobacco and cigars violated the First Amendment. The regulations prohibited outdoor advertising within 1,000 feet of a school, park, or playground, and prohibit “point-of-sale” advertising placed lower than five feet above the floor of retail establishments. These restrictions did not satisfy the fourth step of the <i>Central Hudson</i> test for regulation of commercial speech. That step requires a “reasonable fit” between the means and ends of a regulation, yet the regulations are not “narrowly tailored” to achieve such a fit.	Freedom of (Commercial) Speech
2002	<i>Thompson v. W. States Medical Center</i> , 535 U.S. 357	F	Section 127 of the Food and Drug Administration Modernization Act of 1997, which adds section 503A of the Federal Food, Drug, and Cosmetic Act to exempt “compounded drugs” from the regular FDA approval process if providers comply with several restrictions (including that they refrain from advertising or promoting the compounded drugs) violated the First Amendment. The advertising restriction did not meet the <i>Central Hudson</i> test for acceptable governmental regulation of commercial speech. The government failed to demonstrate that the advertising restriction was “not more extensive than is necessary” to serve its interest in preventing the drug compounding exemption from becoming a loophole by which large-scale drug manufacturers can avoid the FDA drug approval process. <i>Thompson</i> , 535 U.S. at 371. There were several non-speech means by which the government might achieve its objective.	Freedom of (Commercial) Speech
2003	<i>Stogner v. California</i> , 539 U.S. 607	S	A California statute that permitted resurrection of an otherwise time-barred criminal prosecution for sexual abuse of a child, and that was itself enacted after the pre-existing limitations period had expired for the crimes at issue, violated the Ex Post Facto Clause of Article I, Section 10, Clause 1.	Ex Post Facto

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2004	<i>Blakely v. Washington</i> , 542 U.S. 296	S	Washington State's sentencing law, which allows a judge to impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence," <i>Blakely</i> , 542 U.S. at 299, violated the Sixth Amendment right to trial by jury.	Trial by Jury
2005	<i>Granholm v. Heald</i> , 544 U.S. 460	S	Michigan and New York laws that allowed in-state wineries to sell wine directly to consumers but prohibit or discourage out-of-state wineries from doing so discriminated against interstate commerce in violation of the Commerce Clause, and were not authorized by the Twenty-first Amendment.	Interstate Commerce
2005	<i>Roper v. Simmons</i> , 543 U.S. 551	S	Missouri's law setting the minimum age at sixteen for persons eligible for the death penalty violated the Eighth Amendment's ban on cruel and unusual punishment as applied to persons who were under eighteen at the time they committed their offense.	Cruel and Unusual Punishment
2005	<i>United States v. Booker</i> , 543 U.S. 220	F	Two provisions of the Sentencing Reform Act, one that makes the Guidelines mandatory and one that sets forth standards governing appeals of departures from the mandatory Guidelines, were held invalid. The Sixth Amendment right to a jury trial limits sentence enhancements that courts may impose pursuant to the Guidelines.	Trial by Jury
2006	<i>Randall v. Sorrell</i> , 548 U.S. 230	S	Vermont campaign finance statute's limitations on both expenditures and contributions violated freedom of speech.	Freedom of Speech
2007	<i>FEC v. Wisconsin Right to Life</i> , 127 S. Ct. 2652	F	In <i>McConnell v. FEC</i> , 540 U.S. 93 (2003), the Court held that § 203 was not facially overbroad, and, in <i>Wisconsin Right to Life, Inc. v. Federal Election Commission</i> , 546 U.S. 410 (2006), the Court held that it had not purported to resolve future as-applied challenges. Here, the Court held § 203 unconstitutional as applied to issue ads that mention a candidate for federal office, when such ads are not the "functional equivalent" of express advocacy for or against the candidate.	Freedom of Speech

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2007	<i>Abdul-Kabir v. Quarterman</i> , 127 S. Ct. 1654	S	Texas capital sentencing statute impermissibly prevented sentencing “jurors from giving meaningful consideration to constitutionally relevant mitigating evidence.” <i>Abdul-Kabir</i> , 127 S. Ct. at 1659.	Due Process
2007	<i>Brewer v. Quarterman</i> , 127 S. Ct. 1706	S	“Texas capital sentencing statute impermissibly prevented . . . sentencing jury from giving meaningful consideration to constitutionally relevant mitigating evidence.” <i>Brewer</i> , 127 S. Ct. at 1709 (argument of counsel).	Due Process
2008	<i>Davis v. FEC</i> , 128 S. Ct. 2759	F	A subsection of BCRA, providing that if a “self-financing” candidate for the House of Representatives spends more than a specified amount then his opponent may accept more contributions than otherwise permitted, violated the First Amendment. A subsection with disclosure requirements designed to implement the asymmetrical contribution limits also violated the First Amendment.	Freedom of Speech
2008	<i>Kennedy v. Louisiana</i> , 128 S. Ct. 2641	S	Louisiana’s statute that permits the death penalty for rape of a child under twelve was held unconstitutional because the Eighth Amendment bars “the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim.” <i>Kennedy</i> , 128 S. Ct. at 2646.	Cruel and Unusual Punishment
2008	<i>District of Columbia v. Heller</i> , 128 S. Ct. 2783	S	A District of Columbia statute that banned virtually all handguns, and required that any other type of firearm in the home be disassembled or bound by a trigger lock at all times violated the Second Amendment, which the Court held to protect individuals’ right to bear arms.	Right to Bear Arms
2008	<i>Boumediene v. Bush</i> , 128 S.Ct. 2229	F	Holding that the Military Commissions Act, which denied federal courts of jurisdiction to hear habeas corpus actions brought by enemy combatants held at the Naval Station at Guantanamo Bay, effected an unconstitutional suspension of the writ of habeas corpus.	Habeas Corpus